



North Dakota Legislative Council

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EXTRATERRITORIAL PROHIBITIONS ON ABORTION AND POTENTIAL CONSTITUTIONAL CONCERNS

This memorandum provides a broad overview of the current legal landscape of abortion, extraterritorial prohibitions on abortion, and potential constitutional issues with enacting such prohibitions.

CURRENT LEGAL LANDSCAPE OF ABORTION

In *Roe v. Wade*,¹ the United States Supreme Court held the United States Constitution, under the Due Process Clause of the 14th Amendment, provides a right of privacy that protects a woman's right to choose whether to have an abortion. However, the Court held the right is not absolute, and it must be balanced against the state's interests in protecting health, medical standards, and prenatal life.² In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the Supreme Court adhered to the precedent established in *Roe* by upholding a woman's constitutional right to an abortion but allowed states to regulate abortions before viability as long as a state regulation did not impose an undue burden on a woman seeking a legal abortion.

On June 24, 2022, the Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization*³ holding the Constitution does not confer a right to abortion, overturning *Roe* and *Casey* and returning the authority to regulate abortion to the people and their elected representatives.

North Dakota Century Code Section 12.1-31-12 makes it a Class C felony to perform an abortion, except for the pregnant female who is exempted from prosecution under the section. In addition, Section 12.1-31-12 outlines three affirmative defenses for a violation of the section. An affirmative defense is a defense in which the defendant introduces evidence, which, if found to be credible, will negate criminal liability, even if it is proven the defendant committed the alleged act. The affirmative defenses negating criminal liability for a violation of Section 12.1-31-12 are if the abortion was performed to prevent the death of the pregnant female, if the pregnancy resulted from sexual assault or incest, or if the individual performing the abortion was acting within the scope of that individual's regulated profession and under the direction of a physician. Section 12.1-31-12 has a contingent effective date, and becomes effective July 28, 2022.⁴

EXTRATERRITORIAL PROHIBITIONS ON ABORTION

With the overturning of *Roe*, states now may seek to ban abortion within their borders altogether. States also may introduce legislation to ban their citizens from traveling to another state to obtain an abortion by imposing extraterritorial prohibitions on such behavior. In March 2021, legislation was introduced seeking to apply Missouri's abortion restrictions to conduct occurring "[p]artially within and partially outside" the state as well as conduct occurring outside the state, including if the pregnant woman was a Missouri resident; there was a substantial connection with the pregnant woman and Missouri; the unborn child was a Missouri resident at the time of conception; the sexual intercourse that may have conceived the pregnancy occurred in Missouri; or the pregnant woman sought prenatal care in Missouri.⁵

In the alternative, states may seek to ensure the right to obtain an abortion is protected or provide protections to medical providers who offer lawful in-state abortion services to out-of-state patients. This could result in a confusing patchwork of laws across the country and likely will result in legal challenges.

¹ 410 U.S. 113 (1973).

² *Id.*

³ 945 F.3d 265 (5th Cir. 2019), cert. granted, 141 S.Ct. 2619, 209 L.Ed.2d 748 (U.S. May 17, 2021) (No. 19-1392).

⁴ The Attorney General certified to the Legislative Council on June 28, 2022, that the United States Supreme Court overturned *Roe v. Wade*.

⁵ S.B. 603, 101st Gen. Assemb., Reg. Sess., (Mo. 2021).

Scholars have raised constitutional concerns over states imposing extraterritorial prohibitions on abortion, noting the legal battles will shift from fundamental rights to liberty and equality to fights over the principles of federalism and interstate comity. While impossible to predict how a court may rule on the constitutionality of extraterritorial laws, there is some precedent regarding whether states can penalize out-of-state conduct in the context of abortion which could shed light on how a court may rule.

After *Roe* was decided, the United States Supreme Court heard a case involving a Virginia law prohibiting a publication from encouraging abortion. In *Bigelow v. Virginia*,⁶ in 1971, two years before *Roe* was decided, a newspaper that was primarily distributed on the University of Virginia campus ran an advertisement for a New York City service that referred individuals to an abortion provider in New York, where abortion had recently become legal. The Virginia Supreme Court twice upheld the newspaper's publisher's conviction for violating the Virginia law.⁷ However, the United States Supreme Court disagreed, finding the Virginia law infringed on the publisher's First Amendment rights.⁸ The Court casted doubt on a state's ability to legislate the behavior of its citizens when traveling to another state, noting Virginia could not "prevent its residents from traveling to New York to obtain [abortion] services" or "prosecute them for going there."⁹ The Court further stated, "A State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."¹⁰

The Missouri Supreme Court relied on *Bigelow* to reach a similar conclusion. In *Planned Parenthood of Kansas v. Nixon*, the court reviewed a Missouri law that created a civil cause of action against a person who aids or abets a minor in receiving an abortion without parental consent or a judicial bypass.¹¹ The plaintiffs challenged a provision that effectively required Missouri minors who traveled out of state for an abortion to follow Missouri's parental consent law, even if the other state had a different requirement for parental involvement or did not have such a requirement at all.¹² The court reiterated the main points from *Bigelow*, noting "it is beyond Missouri's authority to regulate conduct that occurs wholly outside of Missouri," and "Missouri simply does not have the authority to make lawful out-of-state conduct actionable here, for its laws do not have extraterritorial effect."¹³

Although these decisions contain firm statements against the application of extraterritorial laws prohibiting abortion, the *Bigelow* decision was rooted in First Amendment principles and some scholars assert it was merely dictum, and the second is binding only in Missouri. In overturning *Roe*, the United States Supreme Court could revisit the anti-extraterritoriality principle in *Bigelow*.

If a state enacted legislation specifically targeting extraterritorial abortions, it is possible a court could find constitutionality concerns with such legislation. Some scholars have relied on a right to travel, including the Commerce Clause, Article IV's Privileges and Immunities Clause, and the citizenship clause of the 14th Amendment, as well as conflict of laws and the Dormant Commerce Clause to cast doubt on whether a state may extend its reach beyond its borders to prohibit extraterritorial abortions.¹⁴ However, the United States Supreme Court has not specifically addressed whether a state can prohibit its residents from traveling to another state to obtain a medical procedure or whether a state can criminally punish out-of-state physicians who perform such a procedure. With the overturning of *Roe*, if a state enacts an extraterritorial statute prohibiting abortion, without clear established doctrine or caselaw, it is unclear how a court would rule when faced with these complex issues.

⁶ 421 U.S. 809, 811 (1975).

⁷ *Id.* at 815.

⁸ *Id.* at 818-829.

⁹ *Id.* at 824.

¹⁰ *Id.* at 824.

¹¹ 220 S.W.3d 732, 735 (Mo. 2008).

¹² *Id.* at 745.

¹³ *Id.* at 742.

¹⁴ David S. Cohen, Greer Donley & Rachel Rebouché, The New Abortion Battleground, 122 Columbia L. Rev. (2022); C. Steven Bradford, What Happens if *Roe* is Overruled? Extraterritorial Regulation of Abortion by the States, 35 Ariz. L. Rev. 87 (1992).