

# A DORMANT FOREIGN COMMERCE CLAUSE VIOLATION: TEXAS’ OVERREACH IN RESTRICTING ABORTION TRAVEL TO MEXICO

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\* J.D., Southwestern Law School, 2024.

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## INTRODUCTION<sup>1</sup>

“It has come to our attention that Sidley Austin has decided to reimburse the travel costs of employees who leave Texas to murder their unborn children . . . We are writing to inform you of the consequences that you and your colleagues will face for these actions.”<sup>2</sup>

On July 7, 2022, lawmakers from the Texas Freedom Caucus wrote a letter to the law firm Sidley Austin LLP, threatening to get the firm partners disbarred and charged with criminal penalties for covering their employees’ travel costs for abortions conducted out of the state.<sup>3</sup> The caucus sent this letter less than a month after the Supreme Court decision in *Dobbs v. Jackson Women’s Health*,<sup>4</sup> which struck down fifty years of precedent of women’s constitutional right to an abortion. In other words, the Supreme Court wasted no time showing their power in influencing the new abortion laws.

The group based their threats on a 1975 Texas abortion law that resurfaced into good law after *Dobbs*.<sup>5</sup> This law criminalizes the conduct of anyone who facilitates or furnishes the means for an abortion, which includes abortion pills acquired out of state but ingested in-state.<sup>6</sup> Because the group accused Sidley of assisting in travel for women’s abortion procedures, they helped furnish the means for abortions within this law. To conclude its letter, the group announced that it will introduce legislation that “impose[s] additional civil and criminal sanctions on law firms that pay for abortions or abortion travel” regardless of the jurisdiction it occurs in.<sup>7</sup>

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<sup>1</sup> While abortion is a hot-button topic today, I must first recognize those in opposition who may argue their stance using a non-legal or religious analysis. I respect those with conflicting views, but a non-legal debate is beyond the scope of this note. This note will only address abortion and commerce in a legally rooted analysis.

<sup>2</sup> Letter from Rep. Mayes Middleton, Chairman, Tex. Freedom Caucus., to Yvette Ostolaza, Chair of the Mgmt. Comm. (July 7, 2022) <https://www.freedomfortexas.com/uploads/blog/3b118c262155759454e423f6600e2196709787a8.pdf>.

<sup>3</sup> *Id.*

<sup>4</sup> *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2303 (2022).

<sup>5</sup> See TEX. REV. CIV. STAT. ANN. art. 4512.1 (West 1974).

<sup>6</sup> See Middleton, *supra* note 2; TEX. REV. CIV. STAT. ANN. art. 4512.1 (West 1974) (prev. codified at TEX. PENAL CODE ANN. art. 1191 (1925)).

<sup>7</sup> Middleton, *supra* note 2, at 1.

Ultimately, Texas wants to extend its extraterritorial reach to penalize out of state actors that aid with out of state abortions for Texas women.<sup>8</sup>

This letter is not the first to discuss legislation plans that restrict travel for abortions. Legal experts, politicians, and conservative organizations began to grapple with this uncharted territory and the feasibility of travel restrictions.<sup>9</sup> To what extent can states enforce their laws on residents who travel across state lines to obtain an abortion? How would travel bans affect commerce both domestically and internationally? How closely would states look at the chain of events leading to an abortion in order to punish those who assisted? Abortion travel restrictions fall within untested territory with no established legal precedent, which opens the door for states to innovate their arguments for or against travel bans.<sup>10</sup> These discussions will likely result in the “next frontier in anti-abortion legislation.”<sup>11</sup>

Despite Texas’ clear and explicit statements regarding its intent for such legislation, some conservative, anti-abortion public figures claim that the right to travel for an abortion is not in danger.<sup>12</sup> In response to the Freedom to Travel for Health Care Act of 2022,<sup>13</sup> which would have protected travel across state lines for abortions, conservative party members believe those in favor of protecting travel are overexaggerating an issue that will not occur.<sup>14</sup> Additionally, they stand on the argument that the laws themselves do not criminalize the pregnant woman, only the conduct of

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<sup>8</sup> See Amanda Zablocki & Mikela T. Sutrina, *The Impact of State Laws Criminalizing Abortion*, LEXISNEXIS, PRACTICAL GUIDANCE J. (Sept. 28, 2022), <https://www.lexisnexis.com/community/insights/legal/practical-guidance-journal/b/pa/posts/the-impact-of-state-laws-criminalizing-abortion> (“Certain states, like Texas, are aggressively seeking to enforce abortion bans against out-of-state residents who aid or assist residents of their state in obtaining abortions, whether because such out-of-state residents helped fund travel expenses, provided abortion-related counseling via telehealth, or engaged in other activity with the intention of facilitating an abortion.”).

<sup>9</sup> See Lydia Wheeler & Patricia Hurtado, *Abortion Travel Bans Are ‘Next Frontier’ With Roe Set To Topple*, BL (May 4, 2022), <https://news.bloomberglaw.com/health-law-and-business/abortion-travel-bans-emerge-as-next-frontier-after-roes-end>.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* (quoting professor David S. Cohen, Drexel Sch. of L.).

<sup>12</sup> See *Dobbs*, 142 S. Ct. at 2309 (Kavanaugh, J., concurring) (stating that other constitutional rights would still be upheld, for example, a resident’s right to travel to another state to get an abortion).

<sup>13</sup> Freedom to Travel for Health Care Act, S. 4504, 117th Cong. (2022).

<sup>14</sup> Ali Zaslav, *Republicans block taking up Senate bill to guarantee freedom to travel across states for abortions*, CNN (July 14, 2022), <https://www.cnn.com/2022/07/14/politics/republicans-block-senate-bill-abortion-travel-states/index.html> (explaining Republican Senator Lankford dismissed a bill guaranteeing a woman’s right to travel because such bill only “inflamed” and raised “what-ifs” to travel bans).

those who help, like businesses.<sup>15</sup> Therefore, the laws do not deter women from traveling. However, these assumptions and potential arguments made by public figures would be egregiously untrue due to current and anticipated laws.

To restrict access to abortion across state lines, Texas may try and pass laws that either explicitly or implicitly restrict a woman's access to abortion across state lines.

Organizations like the Thomas More Society and the National Association of Christian Lawmakers have already *explicitly* stated that they began drafting laws with legislators that would restrict a woman's right to travel for an abortion.<sup>16</sup> However, enacting this type of legislation would be difficult. The Biden administration warned states that they would fight against any state law that restricts travel for abortions, as such legislation would violate interstate commerce.<sup>17</sup> Additionally, the right to travel is deeply embedded in the Fourteenth Amendment of the Constitution, which protects individual liberty, allows citizens to travel freely through the states, and grants visitors from other states the same rights and benefits as the arrival state through privileges and immunity.<sup>18</sup> A law that, on its face, explicitly restricts travel for out-of-state abortions would be difficult to pass.

On the other hand, Texas and other conservative states anticipated this hurdle and began searching for loopholes to restrict access to abortion across state lines.<sup>19</sup> Current legislation does not explicitly restrict travel, but rather achieves the same outcome. Like the law referenced in the Sidley letter, which criminalizes those who help furnish the means for an abortion,<sup>20</sup> another Texas law allows citizens to bring civil actions against those who help.<sup>21</sup> These actions include payments and insurance

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<sup>15</sup> S.B. No. 8, 87th Leg., § 171.206(B)(1) (Tex. 2021) (“This subchapter may not be construed to . . . authorize the initiation of a cause of action against or the prosecution of a woman on whom an abortion is performed or induced”).

<sup>16</sup> See Caroline Kitchener & Devlin Barrett, *Antiabortion lawmakers want to block patients from crossing state lines*, THE WASH. POST (June 30, 2022), <https://www.washingtonpost.com/politics/2022/06/29/abortion-state-lines/> (stating that Thomas More Society and National Association of Christian Lawmakers have been working with legislators to explore model legislation that would restrict travel across state lines for abortions).

<sup>17</sup> Kitchener & Barrett, *supra* note 16, at 1.

<sup>18</sup> U.S. CONST. amend. XIV, § 1

<sup>19</sup> Wheeler & Hurtado, *supra* note 9, at 1.

<sup>20</sup> See TEX. REV. CIV. STAT. ANN. art. 4512.1, (West 1974) (prev. codified at TEX. PENAL CODE ANN. art. 1191 (1925)).

<sup>21</sup> S.B. No. 8, 87th Leg., § 171.208(a)(2) (Tex. 2021).

reimbursements, regardless of whether the party knew it was for an abortion.<sup>22</sup>

These laws deter third parties like employers, insurance companies, and unrelated businesses, from helping because of the severity of repercussions. First, out-of-state abortion services are costly when factoring in the procedure price, airfare or gas, Uber fees, lodging, food, etc.<sup>23</sup> Employers and health insurance companies are forced to remain uninvolved, causing many women to endure a cost they likely cannot afford. Additionally, abortion restrictions affect uninsured or low-income women the most,<sup>24</sup> and many women would not be able to pay those costs on their own. If women are unable to fund the means of an out-of-state abortion, they are implicitly restricted from that abortion travel altogether.

Second, this raises questions about the pilot flying the plane or the Uber driver to and from the airport. Under Texas' laws, these parties play a role in furnishing means for an abortion too.<sup>25</sup> With a society that is so interconnected, it is nearly impossible to engage in travel, and the channels of commerce, without the aid of a third party. The laws would deter these industries from providing their services to these women, which directly results in restricting a woman's access to abortions across state lines.

Another type of legislation that would inexplicitly restrict access to abortions across state lines would be one that penalizes pregnant women who receive abortions. As stated above, Texas laws exclude pregnant women from liability for their abortions.<sup>26</sup> Conservatives in other states,

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<sup>22</sup> *Id.*

<sup>23</sup> See Allison McCann, *What It Costs to Get an Abortion Now*, THE N.Y. TIMES (Sept. 28, 2022), <https://www.nytimes.com/interactive/2022/09/28/us/abortion-costs-funds.html> (ranging between \$1,321 and \$4,884 for an abortion procedure and travel under varying circumstances).

<sup>24</sup> See e.g., Dan Keating, et al., *Abortion access is more difficult for women in poverty*, THE WASH. POST (July 10, 2019), <https://www.washingtonpost.com/national/2019/07/10/abortion-access-is-more-difficult-women-poverty/>; Amy Roeder, *The negative health implications on restricting abortion access*, HARV. T.H. CHAN SCH. OF PUB. HEALTH (Dec. 13, 2021), <https://www.hsph.harvard.edu/news/features/abortion-restrictions-health-implications/>; Lindsay Johnson, *The Disparate Impact of Texas' Abortion Ban on Low-Income and Rural Women*, GEO. L. ON POVERTY L. & POL'Y (Feb. 14, 2022), <https://www.law.georgetown.edu/poverty-journal/blog/the-disparate-impact-of-texas-abortion-ban-on-low-income-and-rural-women/>.

<sup>25</sup> See Tina Bellon & Jessica DiNapoli, *U.S. companies lash out at Texas law changes, including abortion ban*, REUTERS (Sept. 4, 2021), <https://www.reuters.com/legal/government/lyft-will-pay-legal-fees-drivers-sued-under-texas-abortion-ban-ceo-2021-09-03/> (referencing Texas bill which allows Uber and Lyft drivers to face legal repercussions for knowingly or unknowingly transporting a pregnant woman to her abortion procedure).

<sup>26</sup> See Wheeler & Hurtado, *supra* note 9, at 1; TEX. REV. CIV. STAT. ANN. art. 4512.1 (West 1974).

however, attempt and continue to promote legislation that holds pregnant women to the same punishment as those who perform the abortions.<sup>27</sup>

Given Texas' momentum of laws that restrict abortion access, criminalizing the women themselves may not be far from the agenda. In fact, it is already happening. A Texas woman was arrested on murder charges for allegedly causing a self-induced abortion in January 2022.<sup>28</sup> Dana Sussman with the National Advocates for Pregnant Women noted that the arrest was unconstitutional but "somewhat expected."<sup>29</sup> Many women in the last decade have been held criminally liable for their abortions by anti-abortion prosecutors who successfully stretched criminalization charges.<sup>30</sup> Scholars believe that prosecutors will continue on this path by using both trigger laws and pre-Roe laws to target pregnant women who furnish the means to their own abortions.<sup>31</sup> Any future laws that penalize women seeking out-of-state abortions would deter them from engaging in that travel.

Texas lawmakers will continue experimenting with legislation until they restrict access to all out-of-state abortions and hold those out-of-state actors liable. Texas lawmakers spoke on the ability to do so in the letter and the press, freely and without hesitation. But after looking at the feasibility of execution, hesitation is needed. Any legislation that restricts access to abortions outside of Texas would also attempt to restrict access to abortions

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<sup>27</sup> See Blake Ellis & Melanie Hicken, *These male politicians are pushing for women who receive abortions to be punished with prison time*, CNN POLITICS (Sept. 21, 2022), <https://www.cnn.com/2022/09/20/politics/abortion-bans-murder-charges-invs> (stating that Louisiana bill HB813 included homicide charges for women who receive abortions, was the "first time such an extreme anti-abortion measure made it out of any state committee" and the proponents plan on introducing a similar bill next year).

<sup>28</sup> Jolie McCullough, *After pursuing an indictment, Starr County district attorney drops murder charge over self-induced abortion*, THE TEX. TRIB. (Apr. 10, 2022), <https://www.texastribune.org/2022/04/10/starr-county-murder-charge/>.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* (finding prosecutors back-doored abortion criminalization through child neglect charges); Eleanor Klibanoff, *Lawyers preparing for abortion prosecutions warn about health care, data privacy*, THE TEX. TRIB. (July 25, 2022), <https://www.texastribune.org/2022/07/25/abortion-prosecution-data-health-care/> (finding more than 1,700 people faced criminal charges over pregnancy outcomes since 1972); Barbara Rodriguez, *Criminal convictions for abortion, miscarriage? Texas abortion ban previews life without Roe v. Wade*, THE 19TH (Sept. 2, 2021) <https://19thnews.org/2021/09/criminal-convictions-abortion-miscarriage-texas-abortion-ban/> (stating that the National Advocates for Pregnant Women, which provides pro bono criminal and civil defense on behalf of people who face charges of abortions, miscarriages, or stillbirths, discloses that criminal cases around pregnancy have been going on for years despite legislation that promises not to).

<sup>31</sup> See Wheeler & Hurtado, *supra* note 9, at 1.

in foreign countries. This raises an international issue that has remained absent from abortion travel discussions.

This note discusses the scenario of a Texas resident who travels to Mexico for an abortion. It answers the following question: Could Texas create new legislation or enforce current legislation that restricts a woman's ability to obtain an abortion in Mexico? Examples would be civil or criminal penalties against third parties helping the woman obtain the abortion, or penalties against the pregnant woman for her abortion performed in Mexico.

The answer is no. Texas would not be able to create or enforce legislation that restricts a woman's access to abortion care in Mexico because such legislation would violate the Dormant Foreign Commerce Clause. This is because (1) abortion services are within Congress' foreign commerce power, (2) Texas would risk retaliation from Mexico, and (3) limitations on travel frustrate the channels of foreign commerce. Texans who go to Mexico will remain protected because their legislation is barred by Congress' foreign commerce power, despite Congress' silence on restricting international travel for abortions.

## I. BACKGROUND

The starting point for this note is Article 1, Section 8, Clause 3 of the U.S. Constitution, which gives Congress the power "[t]o *regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.*"<sup>32</sup> This clause captures both the Interstate Commerce Clause, giving Congress the power to regulate commerce "among the several states," and the Foreign Commerce Clause, giving Congress the power to regulate commerce "with foreign Nations."<sup>33</sup>

### *A. Commerce and the Interstate Commerce Clause*

The meaning of the word "commerce" was the source of many debates and controversies, partially because it is not explicitly defined in the Constitution.<sup>34</sup> The 1787 Federal Convention determined that Congress' commerce power allows them to "legislate in all cases . . . to which the

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<sup>32</sup> U.S. CONST. art. I, § 8, cl. 3.

<sup>33</sup> *Id.*

<sup>34</sup> Legal Information Institute Wex Toolbox, *Commerce Clause*, Cornell L. Sch., [https://www.law.cornell.edu/wex/commerce\\_clause](https://www.law.cornell.edu/wex/commerce_clause).

States are separately incompetent, or in which the harmony of the United States may be interrupted by the exercise of individual legislation,” which later translated into the clause itself.<sup>35</sup> Given the Federal Convention’s intent for defining commerce, one could assume that courts should broadly interpret commerce to include topics that states cannot solve separately. However, disagreements still ensued—which is hardly shocking in the legal community.

Initially, commerce only covered the trading and exchanging of goods, but eventually grew to include transportation and the streams of foreign or interstate commerce.<sup>36</sup> The Supreme Court broadened the framework of Congress’ commerce power in *United States v. Lopez*,<sup>37</sup> allowing Congress to regulate the use of interstate commerce channels, regulate and protect the instrumentalities of interstate commerce or the persons or things in interstate commerce, and regulate the activities that have a substantial relation to or substantially affect interstate commerce.<sup>38</sup>

Additionally, Congress may use its commerce power to regulate criminal activity when it affects interstate commerce. Typically, the structure of the Constitution allows for states to determine local criminal activity.<sup>39</sup> In *Perez v. United States*,<sup>40</sup> Congress successfully exercised its commerce power under the Consumer Credit Protection Act<sup>41</sup> for criminalizing loan sharking that was purely intrastate because of the link between local loan sharking and interstate commerce. In *Gonzales v. Raich*,<sup>42</sup> Congress could regulate criminal activity under the Controlled Substances Act, prohibiting the defendants from manufacturing marijuana, even though marijuana is legal in California.<sup>43</sup> The court found an economic nexus between the act’s purpose, combatting illegal drug trade domestically and internationally, and interstate commerce.<sup>44</sup>

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<sup>35</sup> Max Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787 (1937).

<sup>36</sup> *Gibbons v. Ogden*, 22 U.S. 1, 72 (1824).

<sup>37</sup> *United States v. Lopez*, 514 U.S. 549, 558 (1995).

<sup>38</sup> *United States v. Morrison*, 529 U.S. 598, 609 (2000) (referencing the *Lopez* test).

<sup>39</sup> *Bond v. United States*, 572 U.S. 844, 848 (2014).

<sup>40</sup> *See Perez v. United States*, 402 U.S. 146, 154 (1971).

<sup>41</sup> 18 U.S.C. § 891.

<sup>42</sup> *See Gonzales v. Raich*, 545 U.S. 1, 5 (2005).

<sup>43</sup> 21 U.S.C. § 801.

<sup>44</sup> *Gonzales*, 545 U.S. at 5.



### ***B. The Dormant Interstate Commerce Clause***

An Interstate Commerce Clause analysis is triggered when Congress passes a law onto the states, and the question becomes whether Congress has overreached its commerce authority.<sup>45</sup> The “negative” application of this, or the Dormant Commerce Clause, would be triggered if a state enacts its own legislation that discriminates against, or poses a burden on interstate commerce.<sup>46</sup> This power prevents states from “retreating into economic isolation or jeopardizing the welfare of the Nation as a whole, as it would do if it were free to place burdens on the flow of commerce across its borders[.]”<sup>47</sup> Generally, the rule for the dormant Commerce Clause is to balance the state laws, whether the burden on interstate commerce outweighs local state benefits.<sup>48</sup>

While both the Interstate Commerce Clause and the dormant Interstate Commerce Clause have been heavily debated and scrutinized,<sup>49</sup> the Foreign Commerce Clause has not.<sup>50</sup>

### ***C. The Foreign Commerce Clause***

Even though Congress’ power to regulate interstate commerce and foreign commerce are parallel phrases in the same clause, Congress has an

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<sup>45</sup> *Id.* (debating 21 U.S.C. § 801); *Perez*, 402 U.S. at 154-56 (debating 18 U.S.C. § 891).

<sup>46</sup> *See* *Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 441 (1978) (stating that an inquiry for the dormant Commerce Clause “involves a sensitive consideration of the weight and nature of the state regulatory concern in light of the extent of the burden imposed on the course of interstate commerce.”); *Okla. Tax Comm’n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995) (“[N]egative command, known as the dormant Commerce Clause, prohibit[ed] certain state taxation even when Congress has failed to legislate on the subject.”).

<sup>47</sup> *Okla. Tax Comm’n*, 514 U.S. at 180.

<sup>48</sup> *See* *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (“Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.”); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (citing the balancing test).

<sup>49</sup> *See e.g.*, *United States v. Darby*, 312 U.S. 100, 114 (1941) (allowing regulation of minimum wages for workers for workers producing goods sold in interstate commerce); *Wickard v. Filburn*, 317 U.S. 111, 115 (1942) (regulating the volume of wheat moving in interstate and foreign commerce, as well as the amount produced for the farmer’s own consumption).

<sup>50</sup> *See* Scott Sullivan, *The Future of the Foreign Commerce Clause*, 83 *Fordham L. Rev.* 1955, 1965 (2015) (“[T]he Foreign Commerce Clause has largely evaded close attention by courts or scholars”); Leanne M. Wilson, *The Fate of the Dormant Foreign Commerce Clause after Garamendi and Crosby*, 107 *Colum. L. Rev.* 746, 749 (2007) (“The dormant Interstate Commerce Clause originated close to 200 years ago; the dormant Foreign Commerce Clause’s pedigree does not stretch quote so far back”).

extremely broad scope of foreign commerce power, as opposed to its narrower interstate commerce power.<sup>51</sup> The Founders intended for Congress to have a greater foreign commerce power because of the “special need for uniformity” when handling international relations, foreign intercourse, and foreign trade, all which require the constraint of states’ power.<sup>52</sup> Matters that seem small in a domestic context should be treated with more sensitivity internationally because foreign relations and national sovereignty are triggered.<sup>53</sup>

Under the Foreign Commerce Clause, Congress has the power to create laws that have an extraterritorial reach to criminal conduct in foreign countries, which is a nationality principle recognized in international law.<sup>54</sup> Examples of these laws include prohibiting citizens from traveling abroad to engage in sexual activity with minors (“PROTECT Act”),<sup>55</sup> committing genocide abroad,<sup>56</sup> and engaging in kidnapping abroad.<sup>57</sup>

The rationale for finding these laws constitutional under the Foreign Commerce Clause stems from *some* effect on foreign commerce. For example, the PROTECT Act recognizes a connection between foreign commerce and citizens’ use of foreign commerce channels, i.e., an airplane, regardless of whether the sexual act was commercial or non-commercial.<sup>58</sup> Congress has the power to keep the channels of foreign commerce free from “immoral and injurious uses,” even if there is no attached economic purpose.<sup>59</sup>

However, the Supreme Court has yet to fully explore the scope of Congress’ foreign commerce power.<sup>60</sup> Legal scholars recognize that this lack of framework causes confusion in lower courts, and many anticipate an increase in foreign commerce discussion.<sup>61</sup> Lower courts approach cases

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<sup>51</sup> See *Atl. Cleaners & Dyers v. United States*, 286 U.S. 427, 434 (1932).

<sup>52</sup> See *Wardair Can. Inc. v. Fla. Dept. of Revenue*, 477 U.S. 1, 8 (1986); *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 448, 451-54 (1979).

<sup>53</sup> *Japan Line*, 441 U.S. at 456.

<sup>54</sup> See *United States v. Baston*, 818 F.3d 651, 667 (11th Cir. 2016) (“[N]othing in the Foreign Commerce Clause limits Congress’s authority to enact extraterritorial criminal laws.”); *United States v. Thomas*, 893 F.2d 1066, 1069 (9th Cir. 1990) (“International law permits a country to apply its statutes to extraterritorial acts of its nationals.”).

<sup>55</sup> 18 U.S.C. § 2423.

<sup>56</sup> *Id.* at § 1091.

<sup>57</sup> *Id.* at § 1201.

<sup>58</sup> See 18 U.S.C.A. § 2423(c) (emphasizing “any illicit sexual conduct”).

<sup>59</sup> See *United States v. Pendleton*, 658 F.3d 299, 308 (3rd Cir. 2011).

<sup>60</sup> See *Baston v. United States*, 580 U.S. 1182, 1184 (2017) (Thomas, J., dissenting) (“[T]his court has never thoroughly explored the scope of the commerce power.”).

<sup>61</sup> See Anthony J. Colangelo, *The Foreign Commerce Clause*, 96 Va. L. Rev. 949, 950 (2010) (“[T]he Foreign Commerce Clause has received little sustained analytical attention. That is about

cautiously and analyze Congress' foreign power in three different ways: by using the *Lopez*<sup>62</sup> interstate commerce test directly;<sup>63</sup> by using the *Lopez* test but recognizing Congress' greater foreign commerce power; and by interpreting the clause broadly for a tenable nexus between the constitutionality of a statute and foreign commerce.<sup>64</sup>

Although few Supreme Court cases involve the Foreign Commerce Clause, these few primarily address the “negative” application of the clause: the Dormant Foreign Commerce Clause.

#### ***D. The Dormant Foreign Commerce Clause***

Like the Interstate Commerce Clause, which can have a “negative” application recognized as dormant, the dormant Foreign Commerce Clause prohibits states from passing legislation that would affect commerce with foreign nations.<sup>65</sup> The Supreme Court recognizes *Japan Line, Ltd. v. County of Los Angeles*<sup>66</sup> as the major case for the Dormant Commerce Clause, which articulated the limits on state's legislation. In *Japan Line, Ltd.*, California's law imposed an *ad valorem* tax on Japanese shipping containers that were temporarily stored in the state.<sup>67</sup>

Any state law that restricted Congress from speaking with “one voice” or caused a risk of retaliation from a foreign national would violate the Dormant Commerce Clause.<sup>68</sup> Congress has primarily used the “one voice”

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to change”); Naomi Harlin Goodno, *When the Commerce Clause Goes International: A Proposed Legal Framework for the Foreign Commerce Clause*, 65 Fla. L. Rev. 1139, 1148 (2013) (“[The Foreign Commerce Clause] may soon take center-stage”); *United States v. Clark*, 435 F.3d 1100, 1116 (9th Cir. 2006) (explaining the confusion that courts have in deciding whether to analyze foreign commerce equally to interstate commerce, since the Supreme Court has not issued framework that's exclusive or mandatory).

<sup>62</sup> See *United States v. Lopez*, 514 U.S. 549, 558 (1995).

<sup>63</sup> See *United States v. Bredimus*, 352 F.3d 200, 205-06 (5th Cir. 2003) (analyzing foreign commerce under interstate commerce principles to find the use of channels implicates Congress' foreign commerce power); *United States v. Cummings*, 281 F.3d 1046, 1049 & n.1 (9th Cir. 2002).

<sup>64</sup> See *Baston v. United States*, 580 U.S. 1182, 1184 (2017) (Thomas, J., dissenting) (recognizing the split laid out in *United States v. Bollinger*, 798 F.3d 201, 214 (4th Cir. 2015)).

<sup>65</sup> *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 434 (1979).

<sup>66</sup> See *Japan Line*, 441 U.S. at 449 (referring to the “negative implications” of foreign commerce power, which was later coined as the Dormant Commerce Clause.); *Baston v. United States*, 580 U.S. 1182, 1184 (Thomas, J., dissenting) (recognizing *Japan Line* as the Supreme Court's Dormant Commerce Clause case).

<sup>67</sup> See *Japan Line*, 441 U.S. at 449.

<sup>68</sup> *Id.*

test to limit several states from intervening in matters affecting international trade.<sup>69</sup>

## II. THE FOREIGN COMMERCE CLAUSE WOULD BAR ANY LEGISLATION TEXAS CREATES THAT WOULD PREVENT A WOMAN TO OBTAIN AN ABORTION IN MEXICO

If Texas creates legislation restricting a woman's access to abortion care in Mexico, such legislation will violate the Dormant Foreign Commerce Clause. Texas cannot create bills that explicitly or implicitly restrict a woman's right to travel for an abortion in Mexico.

By using the model in *Japan Line, Ltd. v. County of Los Angeles*,<sup>70</sup> these types of laws would violate the Dormant Foreign Commerce Clause for three reasons: (1) Abortion services are within Congress' foreign commerce power, (2) Texas would risk retaliation from Mexico, and (3) limitations on travel frustrate the channels of foreign commerce.

### A. *Abortion services are within Congress' foreign commerce power*

#### 1. Abortion and Interstate Commerce

Reproductive care, including abortions, accounts for a substantial part of the billion-dollar healthcare system. In 2021, the U.S. national healthcare expenditure, or the collective amount that citizens spent on healthcare, reached \$4.3 trillion and is estimated to reach \$6.2 trillion by 2028.<sup>71</sup> U.S. healthcare providers and facilities spent \$11.36 billion on cloud-based technology alone—a 33% increase from the year prior in 2019.<sup>72</sup> Women's reproductive care lies within the bounds of these amounts, which includes reproductive care like pregnancies, contraceptives, and abortions.

To get an estimate on the costs for reproductive healthcare in a woman's lifetime, Leena Kulkarni of Harvard T.H. Chan School of Public Health conducted a study in 2018, *only* accounting for Pap smears, HPV

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<sup>69</sup> *United States v. Pendleton*, 658 F.3d 299, 306-07 (3d Cir. 2011), *cert. denied*, 2012 WL 2197195 (U.S. June 18, 2012) (No. 11-7711).

<sup>70</sup> *Japan Line*, 441 U.S. at 449 (explaining that the law violates the dormant Foreign Commerce Clause because the tax would enhance the risk of multiple taxations imposed upon Japan and would impair federal uniformity when uniformity is essential).

<sup>71</sup> Insider Intelligence, *US Healthcare Industry in 2022: Analysis of the health sector, healthcare trends, & future of digital health*, (Jan. 11, 2022), <https://www.insiderintelligence.com/insights/healthcare-industry/>.

<sup>72</sup> *Id.*

tests, birth control, feminine hygiene products and loss earnings resulting from one year off work.<sup>73</sup> On these factors alone, women endure \$154,643 a year in reproductive costs, compared to \$28,866 for an average male's reproductive health in his lifetime.<sup>74</sup> Costs associated with pregnancy, childbirth, and post-partum care average between \$14,768-\$26,280.<sup>75</sup> Reproductive care has a substantial economic footprint not only on patients, but on the healthcare system in general.

Additionally, abortion clinics implicate commerce because they are "income-generating businesses that employ physicians and other staff to provide services and goods to the patients."<sup>76</sup> A Texas court recognized abortion clinics' impact on interstate commerce in *United States v. Texas*,<sup>77</sup> a case that sparked media attention just a few months prior to the overturning of *Roe v. Wade*.<sup>78</sup> In *United States v. Texas*, the Department of Justice challenged the constitutionality of Texas S.B. 8, banning almost all abortions in the state after six weeks of pregnancy, with no exception for rape or incest.<sup>79</sup> The Department of Justice based its argument on the Fourteenth Amendment, which at that time protected abortions, and successfully argued that the bill violated the constitutional right to an

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<sup>73</sup> Leena Kulkarni, *My Uterus Costs more Than A Porche*, HUFFPOST (Aug. 31, 2018, 5:45 AM EDT), [https://www.huffpost.com/entry/opinion-uterus-costs-porsche\\_n\\_5b7da92fe4b0348585fcel17c](https://www.huffpost.com/entry/opinion-uterus-costs-porsche_n_5b7da92fe4b0348585fcel17c), (calculating only a small selection in woman's health, not including other essential costs for mammograms, ultrasounds, pregnancies, etc.).

<sup>74</sup> *Id.*

<sup>75</sup> Matthew Rae, et al., *Health costs associated with pregnancy, childbirth, and postpartum care*, HEALTH SYSTEM TRACKER (July 13, 2022), <https://www.healthsystemtracker.org/brief/health-costs-associated-with-pregnancy-childbirth-and-postpartum-care/#Average%20additional%20health%20spending%20by%20people%20with%20large%20employer%20coverage%20who%20give%20birth,%20relative%20to%20those%20who%20do%20not%20give%20birth,%202018-2020>.

<sup>76</sup> *United States v. Gregg*, 226 F.3d 253, 262 (3d Cir. 2000) (holding that the Freedom of Access to Clinic Entrances Act, also known as, "FACE," was constitutional under Congress' commerce power because abortion facilities are income-generating businesses).

<sup>77</sup> *United States v. Texas*, 566 F.Supp.3d 605, 620 (W.D. Tex. 2021) (granting a preliminary injunction blocking S.B. 8 because it was unconstitutional under the Fourteenth Amendment).

<sup>78</sup> *Roe v. Wade*, 410 U.S. 113 (1973); *See e.g.*, Press Release, Att'y Gen. Merrick B. Garland, U.S. Dep't of Just., Press Release No. 21-975 (Oct. 6, 2021); ACLU, *Texas Abortion Ban Blocked for Now* (Oct. 6, 2021), <https://www.aclu.org/press-releases/texas-abortion-ban-blocked-now>; Ryan Lucas, *A U.S. judge blocks enforcement of Texas' controversial new abortion law*, NPR (Oct. 6, 2021), <https://www.npr.org/2021/10/06/1040221171/a-u-s-judge-blocks-enforcement-of-texas-controversial-new-abortion-law>.

<sup>79</sup> S.B. No. 8, 87th Leg. (Tex. 2021).

abortion.<sup>80</sup> The court granted a preliminary injunction and temporarily blocked the bill for an uncertain amount of time.<sup>81</sup> However, after the Supreme Court no longer recognized abortion under the Fourteenth Amendment, the bill became good law.<sup>82</sup>

Although the rationale for blocking the bill was not based on the Commerce Clause, the judge engaged in noteworthy dialogue related to abortion and interstate commerce to establish standing for the case. The court noted that in a previous instance, Congress recognized the connection between abortion and interstate commerce in 18 U.S.C. § 1531, the partial-birth abortion ban.<sup>83</sup> The court then saw that Texas' bill would extend liability to persons outside state lines, implicating interstate commerce such as outside insurance companies reimbursing Texas abortions, banks processing payments, medical device suppliers outfitting providers, and persons transporting patients to the appointments.<sup>84</sup> Lastly, the influx of individuals crossing Texas state lines implicates commerce not only by affecting clinics in nearby states (or countries), but also by impeding on other pregnant individuals' access in those states due to backlogged clinics.<sup>85</sup>

The Woman's Health Protection Act ("WHPA") also recognized the relationship between reproductive health and interstate commerce. The House of Representatives introduced the WHPA in June 2021, and assigned the WHPA to the Energy and Commerce committee. This assignment to the Energy and Commerce committee is noteworthy because the House recognizes how WHPA grounds itself in the commerce clause, giving Congress authority for enactment.<sup>86</sup> Section 21 of the Act states that "[a]bortion restrictions substantially affect interstate commerce in

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<sup>80</sup> See *Texas*, 566 F.Supp.3d at 665 ("It is substantially likely that S.B. 8 violates the Fourteenth Amendment, whether as an unconstitutional pre-viability abortion ban, or as an unconstitutional undue burden on pre-viability abortion.").

<sup>81</sup> Ryan Lucas, *A U.S. judge blocks enforcement of Texas' controversial new abortion law*, NPR (Oct 6, 2021), <https://www.npr.org/2021/10/06/1040221171/a-u-s-judge-blocks-enforcement-of-texas-controversial-new-abortion-law> ("Pitman's ruling blocks enforcement of the Texas law on a temporary basis, and it's unclear how long it will be in effect.").

<sup>82</sup> Erin Douglas & Eleanor Klibanoff, *Abortions in Texas have stopped after Attorney General Ken Paxton said pre-Roe bans could be in effect, clinics say*, THE TEXAS TRIBUNE (June 24, 2022, 1:00 PM CST), <https://www.texastribune.org/2022/06/24/texas-clinics-abortions-whole-womans-health/>.

<sup>83</sup> 18 U.S.C. §1531(a) ("Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion . . .").

<sup>84</sup> See *Texas*, 566 F.Supp.3d at 641.

<sup>85</sup> *Id.*

<sup>86</sup> H.R. 3755, 117th Cong. § 25(A).

numerous ways.”<sup>87</sup> Healthcare providers purchase medicine and medical equipment, obtain and provide training, and employ doctors and staff.<sup>88</sup> Restricting the access to abortion would substantially impact interstate commerce.

Abortion care can easily be linked with interstate commerce and has survived many Interstate Commerce Clause analyses by the courts and Congress. Therefore, given the more liberal interpretation of an analysis under the Foreign Commerce Clause, abortion abroad falls under Congress’ foreign commerce power.

## **2. Texas is Barred from Legislation because Abortions Abroad Implicate Foreign Commerce.**

With the expansion of technology and global accessibility, new markets will emerge, and existing markets will evolve under the foreign commerce umbrella. The medical tourism industry is a market that continues to evolve under this umbrella.

Medical tourism is the act of traveling outside one’s home country to seek medical treatment in another foreign country.<sup>89</sup> The global medical tourism market size was approximately \$104.68 billion in 2019 and is projected to reach \$273.72 billion by 2027.<sup>90</sup>

This industry is recognized worldwide by global organizations like the OEC, Joint Commission International, Quality Healthcare, and health insurance companies like Medicaid. Other insurance companies like Blue Shield, Anthem Blue Cross, Aetna, and CIGNA include medical tourism insurance as part of their coverage, which is an attractive option for both the insurance company and the patient because of the cost saving benefits.<sup>91</sup>

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<sup>87</sup> *Id.* at § 21.

<sup>88</sup> *Id.*

<sup>89</sup> CDC, *Medical Tourism: Travel to Another Country for Medical Care*, TRAVELERS’ HEALTH (June 1, 2023), <https://wwwnc.cdc.gov/travel/page/medical-tourism>.

<sup>90</sup> Sahil S. Sanjivan, *Medical Tourism Market by Treatment Type . . . Global Opportunity Analysis and Industry Forecast, 2019-2027*, ALLIED MKT. RSCH. (Nov. 2020), <https://www.alliedmarketresearch.com/medical-tourism-market>.

<sup>91</sup> See, e.g., Neil Lunt et. al., *Medical Tourism: Treatments, Markets and Health System Implications: A scoping review*, OECD, (including organizations like OECD, Joint Comm’n Int’l, Quality Healthcare Advice Trent Accreditation); David Paul et. al., *Insurance Companies Adapting to Trends by Adopting Medical Tourism*, *The Health Care Manager* vol. 36, n. 4, 326, 327 (Sept. 2017); MED. TOURISM MAGAZINE, *Insurers Changing the Game in Medical Tourism*, <https://www.magazine.medicaltourism.com/article/insurers-changing-game-medical-tourism>.

For centuries, people have been engaging in this type of tourism for various reasons, such as lower costs or procedure availability when it is illegal or unavailable at home.<sup>92</sup> For example, Switzerland treats patients who seek assisted suicide, which is illegal in certain U.S. states.<sup>93</sup> Moreover, a Florida resident went to Chennai for a hip replacement surgery that saved her money and was unavailable in the United States.<sup>94</sup>

Abortions abroad are also recognized under medical tourism, where clinics noticed an increase in patients after *Dobbs*, especially in Mexico.<sup>95</sup> While some argue that abortion tourism is not a great idea because of unclear access to post-operative care,<sup>96</sup> others find innovative ways to encourage abortion tourism, like a floating abortion clinic in the Gulf of Mexico.<sup>97</sup> Medical tourism, including abortion tourism, directly impacts the importing and exporting of healthcare services between foreign nations, which is strictly within Congress' foreign commerce power.<sup>98</sup> Foreign commerce is defined broadly in *United States v. Clark*: "foreign commerce . . . includes commerce with a foreign country."<sup>99</sup> If the court found that getting on a plane from the United States to Cambodia was enough activity for foreign commerce, driving a car or taking a plane to fly to Mexico is, too.

### ***B. Texas Legislation Could Cause Retaliation from Mexico***

For the next two sections, I will be using rationales from the dormant foreign commerce case *Japan Line, Ltd. v. County of Los Angeles*.<sup>100</sup> In the

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<sup>92</sup> Lisa Schaffer, *Patients With Passports: Is Medical Tourism Legal?*, FIND LAW (Aug. 29, 2018, 7:00 AM), <https://www.findlaw.com/legalblogs/law-and-life/patients-with-passports-is-medical-tourism-legal/>.

<sup>93</sup> *Id.*

<sup>94</sup> Levi Burkett, *Medical Tourism: Concerns, Benefits, and the American Legal Perspective*, 28 J. LEGAL MED. 223, 233-34 (2007) (explaining the FDA had not approved the procedure that was still in clinical trial).

<sup>95</sup> See *infra*, note 104.

<sup>96</sup> Allyson O'Daniel & Elizabeth Ziff, *International Travel to Access Abortions is a Global Health Problem—Not a Solution*, MS. MAGAZINE (June 3, 2022), <https://msmagazine.com/2022/06/03/international-travel-abortion-access/>.

<sup>97</sup> Bold Business, *Medical Tourism In Action: A Floating Abortion Clinic* (July 29, 2022), <https://www.boldbusiness.com/society/medical-tourism-action-floating-abortion-clinic/>.

<sup>98</sup> I. Glenn Cohen, *Medical Tourism: The View from Ten Thousand Feet*, 40 HASTINGS CTR. REP. 2010 Mar-Apr; 11-2. doi: 10.1353/hcr.0.0238. PMID: 20391844.

<sup>99</sup> See *United States v. Clark*, 435 F.3d 1100, 1114 (9th Cir. 2006).

<sup>100</sup> See *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 449 (1979) (referring to the "negative implications" of foreign commerce power, which was later coined as the Dormant Commerce Clause); *Bastion v. United States*, 580 U.S. 1182, 1184 (Thomas, J., dissenting) (recognizing *Japan Line* as the Supreme Court's Dormant Commerce Clause case).



case, California's law imposed an *ad valorem* tax on Japanese shipping containers stored temporarily in the state.<sup>101</sup> The Supreme Court held that the law violated the Dormant Commerce Clause by considering two rationales from the case.<sup>102</sup> First, the tax would enhance the risk of multiple taxations imposed upon Japan.<sup>103</sup> Second, it would impair federal uniformity when uniformity is essential.<sup>104</sup> Federal uniformity would be frustrated if the state law could cause disputes to arise between the U.S. and foreign nation.<sup>105</sup> The risk of retaliation from the foreign nation is too significant, as it would not only impact the state but the entire nation.<sup>106</sup> Like the policy behind the extraterritorial laws, Congress holds the power to regulate the vehicles of commerce between the U.S. and foreign nation. State actions would restrict Congress' ability to "speak with one voice."<sup>107</sup>

In Mexico, medical tourism is a \$6.75 billion industry. Approximately 800,000 to 1 million Americans travel to Mexico to seek medical procedures, a substantial amount being Texas residents.<sup>108</sup> The medical tourism industry plays a vital role in Mexico's economy, so much so that the federal government is actively involved with medical tourism. The government created the National Program for Medical Tourism and continues to contribute to the hospital accreditation process.<sup>109</sup> Together with the Ministry of Tourism, it launched promotional campaigns in the United States and Canada to promote its medical tourism services and dedicated specific attention to residents of Texas and California without health insurance.<sup>110</sup>

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<sup>101</sup> *Japan Line*, 441 U.S. 434, 436.

<sup>102</sup> *Id.* at 446-47.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 448.

<sup>105</sup> *Id.* at 449-50.

<sup>106</sup> *Id.* at 450 (allowing a foreign nation to endure multiple taxations on its instrumentalities of foreign commerce would result in a retaliation on American-owned instrumentalities, effecting transportation equipment on a national level).

<sup>107</sup> *Id.* at 449 (quoting *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285 (1976)).

<sup>108</sup> Hair Center Mexico, *Medical Tourism Mexico: High Quality, Affordable Prices*, PRNEWswire (Nov. 5, 2021, 8:31 ET), <https://www.prnewswire.com/news-releases/medical-tourism-mexico--high-quality-affordable-prices-301416810.html>; Emanuel Orozco Núñez, et al., *An Overview of Mexico's Medical Tourism Industry – The Cases of Mexico and Monterrey*, ver. 1.0, SFU MED. TOURISM RSCH. GRP., at 78 (Aug. 2014) (finding that in the border city of Monterrey, 30% of users are from Texas or Chicago).

<sup>109</sup> Emanuel Orozco Núñez, *supra* note 108, at 68-69.

<sup>110</sup> *Id.* at 69, 85.

Abortion clinics in Mexico, which are income-generating businesses,<sup>111</sup> also play a role in the medical tourism industry. Because of Mexico Supreme Court's decision in 2021 to decriminalize abortion,<sup>112</sup> many women in the United States have been participating in medical tourism to seek abortion treatments in Mexico.<sup>113</sup> An abortion clinic in Mexico estimated that Americans made up 25% of patients receiving abortions there in May 2022, rising to 50% in July.<sup>114</sup> A pharmacy in Mexico recognized a sharp increase in clientele for over-the-counter abortion pills that sell for \$400.<sup>115</sup>

Given how vital medical tourism is to Mexico's economy and how impactful Texans are to that contribution, Texas legislation restricting a woman's ability to seek an abortion in Mexico may result in foreign conflict and retaliation. If Texas passed legislation that had civil or criminal repercussions for women seeking abortions in Mexico or third parties assisting, women would be indirectly prohibited from engaging in abortion services in Mexico out of fear of prosecution or fine. Beyond abortion services, the legislation may even restrict women who want other reproductive medical procedures in Mexico for cost saving or emergency purposes.

Although lawmakers claim that their restrictive abortion laws do not affect those who have miscarriages or pregnancy complications, there is a lot of gray area in reproductive health.<sup>116</sup> Texas, along with many other states, has often confused other feminine health conditions with abortions.<sup>117</sup> For example, in 2021, a woman in Texas arrived at the hospital

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<sup>111</sup> See *Bastón v. United States*, 580 U.S. 1182, 1184 (2017) (Thomas, J., dissenting) (“[T]his court has never thoroughly explored the scope of the commerce power.”).

<sup>112</sup> Coahuila Penal Code art. 196.

<sup>113</sup> Catherine E. Shoichet, *More Americans who want abortions are turning to Mexico for help*, CNN (July 25, 2022, 1:18 PM), <https://www.cnn.com/2022/07/21/health/mexico-abortion-assistance-ccc/index.html>.

<sup>114</sup> Lilly Quiroz, *This Mexican clinic is offering discreet abortions to Americans just over the border*, NPR (Aug. 31, 2022, 5:00 AM ET), <https://www.npr.org/2022/08/31/1119886629/abortion-mexico-roe-wade-ban-texas-supreme-court-border-tijuana>.

<sup>115</sup> John Burnett, *Mexico border town sees an increase in abortion drugs to women from the U.S.*, NPR (May 9, 2022, 12:39 PM ET), <https://www.npr.org/2022/05/09/1097210654/mexican-border-town-sees-an-increase-in-sales-of-abortion-drugs-to-women-from-th> (describing the amount of women that get abortion pills as “[a] lot. Like crazy”).

<sup>116</sup> Maria Mendez, *Texas laws say treatments for miscarriages, ectopic pregnancies remain legal but leave lots of space for confusion*, TEX. TRIB. (July 20, 2022, 5:30 PM CDT), <https://www.texastribune.org/2022/07/20/texas-abortion-law-miscarriages-ectopic-pregnancies/>.

<sup>117</sup> Pam Belluck, *They Had Miscarriages, and New Abortion Laws Obstructed Treatment*, N.Y. TIMES (July 17, 2022) <https://www.nytimes.com/2022/07/17/health/abortion-miscarriage-treatment.html>.

after experiencing a miscarriage in her first trimester.<sup>118</sup> The doctor performed a safe and standard medical procedure used to quickly remove tissue from failed pregnancies.<sup>119</sup> A year later, this same woman suffered another miscarriage and arrived at the same hospital for the same procedure.<sup>120</sup> This time, she was denied care because of a new Texas law banning abortions after six weeks.<sup>121</sup> The procedure to remove tissue from miscarriages was the same procedure used for some abortions.<sup>122</sup> This woman then endured a gruesome and scarring experience, holding her husband's hand as she sat in a dark red bathtub, enduring forty-eight hours of constant bleeding and pain.<sup>123</sup>

Medical professionals cannot risk jail time or expensive fines, so they often deny or delay care for pregnancy complications in fear of being confused with abortion care.<sup>124</sup> Moreover, an OB-GYN in San Antonio had to wait a day to treat a patient who started to miscarry and developed a womb infection.<sup>125</sup> Furthermore, a patient in Dallas had to carry her dead fetus around for two weeks until she found an OB-GYN willing to remove it.<sup>126</sup> Pharmacists refuse to fill prescriptions for certain medications that are related to abortions, but are used for other treatments.<sup>127</sup>

These foregoing medical procedure and prescription issues are just scratching the surface of the current issues going on throughout the nation. If Texas implements laws restricting abortion services in Mexico, they may also restrict other necessary services that could be confused with abortion care.

Therefore, even if Texas argues that abortion services do not make up a substantial amount of Mexico's GDP, many other services would be affected if related to abortion services. Restricting access to health care services would affect the stream of foreign commerce. With the Mexican government's immense involvement in medical tourism and purposefully attracting residents from Texas, foreign conflict may arise between Mexico

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<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *See Mendez, supra*, note 116, at 1.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

and the United States. Like how the courts in *Japan Line*<sup>128</sup> recognized double charging a country could lead to retaliation, no country likes losing money.

### C. *Texas Legislation Would Impose Restrictions on the Channels of Foreign Commerce*

If Texas passed legislation restricting travel for abortion, that would directly affect the vehicles of foreign commerce. In *Japan Line*, the court recognized that Congress holds the power to regulate the vehicles of commerce between the U.S. and foreign nations.<sup>129</sup> Congress has the power to keep the channels of foreign commerce free from “immoral and injurious uses,” even if there is no attached economic purpose.<sup>130</sup>

Women who travel to Mexico would be using the vehicles of foreign commerce, whether on a plane or in a car. Additionally, women may not even be able to engage in the vehicles of foreign commerce without the help of third parties, such as employers, travel agencies, or the Uber to the airport. Any law restricting that ability would be barred by Congress’ foreign commerce power.

Only Congress can create laws and limitations on a woman’s ability to travel to Mexico for abortion care. The U.S. government is fully aware that citizens seek medical treatment outside of the country, but it has never legislated this area.<sup>131</sup> That alone does not mean Texas has that right to legislate it.<sup>132</sup> Although unlikely to occur because of the undue burdens that would result,<sup>133</sup> Congress does have the power to restrict travel to foreign countries for abortions just as it made laws with extraterritorial reach. However, as of now, in an absence of a statement by Congress, states like

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<sup>128</sup> *Japan Line*, 441 U.S. at 448 (holding that Congress needs to avoid multiple taxation to Japan).

<sup>129</sup> *Id.*

<sup>130</sup> See *United States v. Pendleton*, 658 F.3d 299, 308 (3d Cir. 2011) (quoting *Caminetti v. United States*, 242 U.S. 470, 491 (1917)).

<sup>131</sup> See *The Globalization of Health Care: Can Medical Tourism Reduce Health Care Costs?: Hearing Before the Spec. Comm. on Aging*, 109th Cong. 18 (2006) (statement of Dr. Arnold Milstein), <http://www.gpo.gov/fdsys/pkg/CHRG-109shrg30618/pdf/CHRG-109shrg30618.pdf>.

<sup>132</sup> This is the “dormant” part of the clause. See *supra*, under *Dormant Commerce Clause* (“Dormant Commerce Clause invalidates any state law regardless of whether Congress debated the issue before”).

<sup>133</sup> I. Glenn Cohen, *Protecting Patients with Passports: Medical Tourism and the Patient-Protective Argument*, 95 IOWA L. REV., 1467, 1511 (2010) (showing difficulties such as foreign countries alerting the U.S., discovery into pre-travel, establishing primary purpose of trip was in fact for medical tourism).

Texas are barred from passing legislation that restricts abortion access in Mexico.

#### CONCLUSION

To conclude, Texas is barred from creating legislation that would restrict a woman's access to abortion care in Mexico, as such legislation would violate the dormant Foreign Commerce Clause. Additionally, Texas cannot create bills that implicitly restrict a woman's right to travel for an abortion in Mexico. Abortion services are within Congress' foreign commerce power, which would risk retaliation and frustrate foreign commerce channels.