

# BEYOND BORDERS: EXAMINING THE CONSTITUTIONALITY OF ALABAMA'S EXTRATERRITORIAL APPLICATION OF ITS ABORTION BAN

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## I. INTRODUCTION

In June 2022, the Supreme Court issued its opinion in *Dobbs v. Jackson Women's Health Organization*.<sup>1</sup> This decision overturned *Roe v. Wade* and the longstanding constitutional right to abortion.<sup>2</sup> For the first time in nearly 50 years, the issue of abortion regulation returned to the states.<sup>3</sup> The Supreme Court's decision in *Dobbs* immediately affected abortion access, throwing abortion regulation across the United States into turmoil.<sup>4</sup> Roughly three months after the *Dobbs* decision, nearly 22 million women lived in states that banned or extremely restricted abortion access.<sup>5</sup>

The Supreme Court's decision in *Dobbs* caused pre-*Roe* abortion bans to take effect immediately.<sup>6</sup> These bans were still on the books in nine states, and in *Roe v. Wade*, the Supreme Court previously held them to be unconstitutional.<sup>7</sup> In thirteen other states, so-called "trigger laws" took effect.<sup>8</sup> The *Dobbs* decision also paved the way for states to pass increasingly strict laws, both banning and criminalizing abortion.<sup>9</sup> Some state officials have expressed their desire to not only prohibit and

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

2. *Roe v. Wade*, 410 U.S. 113 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

3. *Dobbs*, 142 S. Ct. at 2284 (holding that regulation of abortion is returned "to the people and their elected representatives").

4. See generally Sara Rosenbaum et al., *Dobbs: The Immediate Aftermath and the Coming Legal Morass*, THE COMMONWEALTH FUND (June 27, 2022), <https://www.commonwealthfund.org/blog/2022/dobbs-immediate-aftermath-and-coming-legal-morass> [https://perma.cc/LWC9-L84G].

5. See generally Becca Damante & Kiera B. Jones, *A Year After the Supreme Court Overturned Roe v. Wade, Trends in State Abortion Laws Have Emerged*, CTR. FOR AM. PROGRESS (June 15, 2023), <https://www.americanprogress.org/article/a-year-after-the-supreme-court-overturned-roe-v-wade-trends-in-state-abortion-laws-have-emerged/> [https://perma.cc/RJ5D-TTWD].

6. See generally Elizabeth Nash & Isabel Guarnieri, *13 States Have Abortion Trigger Bans – Here's What Happens When Roe is Overturned*, GUTTMACHER INST. (June 6, 2022), <https://www.guttmacher.org/article/2022/06/13-states-have-abortion-trigger-bans-heres-what-happens-when-roe-overturned> [https://perma.cc/JHM6-4Z68] (explaining that nine states had abortion bans on the books – enacted before *Roe v. Wade* – that could take effect once the Supreme Court overturned *Roe*).

7. *Roe v. Wade*, 410 U.S. 113, 164–66 (1973), *overruled by* *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

8. Nash & Guarnieri, *supra* note 6 (explaining that "13 [states] have laws in place that are designed to be 'triggered' and take effect automatically or by quick state action if *Roe* no longer applies—Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, North Dakota, Oklahoma, South Dakota, Tennessee, Texas, Utah, and Wyoming.").

9. Damante, *supra* note 5.

criminalize abortion within their state's borders but also to punish abortions outside of their state's borders.<sup>10</sup>

For example, in *Fund Texas Choice v. Paxton*, Texas Attorney General Ken Paxton stated that abortion criminalization is a means to an end in his motion to dismiss.<sup>11</sup> Paxton believes criminalizing abortion will end the practice altogether.<sup>12</sup> Paxton declared that it does not matter where an abortion occurs, instead it matters where an individual procured the abortion.<sup>13</sup> Abortion procurement includes any preparations made in anticipation of an abortion, not necessarily an abortion itself.<sup>14</sup> For example, booking a pregnant woman a bus ticket or a hotel room in another state is abortion procurement.<sup>15</sup> Paxton stated that if abortion procurement occurs in Texas, it intrudes upon Texas' interest in protecting human life.<sup>16</sup>

State laws that seek to criminalize abortion beyond the state's border open the door to various legal and constitutional issues, impacting the right to interstate travel, the right to privacy, and extraterritorial jurisdiction.<sup>17</sup> Generally, states cannot enforce laws beyond their borders.<sup>18</sup> Yet, extraterritorial jurisdiction allows a state to enforce its laws beyond its borders in certain circumstances.<sup>19</sup> Criminal extraterritorial abortion laws are uncharted territory, as courts have yet to consider their constitutionality.<sup>20</sup> Accordingly, this Note will argue that the Supreme Court's holding in *Strassheim v. Daily*, which created a framework for courts to analyze states' application of extraterritorial jurisdiction, is applicable in the context of criminal extraterritorial abortion bans.<sup>21</sup> Application of the *Strassheim* test leads to the conclusion that a state acts unconstitutionally when it utilizes extraterritorial jurisdiction to enforce its abortion ban beyond the state's borders, as acts in furtherance of obtaining

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10. *Id.*

11. *Fund Texas Choice v. Paxton*, 658 F.Supp.3d 377, 400 (W.D. Tex. 2023).

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Paxton*, 658 F.Supp.3d at 400.

18. See generally *Extraterritorial Jurisdiction*, NAT'L ACTION PLANS ON BUS. & HUM. RTS., <https://globalnaps.org/issue/extraterritorial-jurisdiction/> [<https://perma.cc/TPQ9-AKC4>] (last visited Feb. 4, 2024).

19. *Id.*

20. See generally Rachel M. Cohen, *The Coming Legal Battles of Post-Roe America: How Criminalizing Abortion May Change with Out-of-State Prosecution*, VOX (June 27, 2022, 7:30 AM), <https://www.vox.com/2022/6/27/23183835/roe-wade-abortion-pregnant-criminalize> [<https://perma.cc/H2R9-GAVY>].

21. *Strassheim v. Daily*, 221 U.S. 280 (1911).

an abortion cannot produce, or be intended to produce, concrete detrimental effects in any state.

Part II discusses an overview of jurisdiction and extraterritoriality.<sup>22</sup> This Part also introduces *Strassheim v. Daily* and discusses the history and application of the *Strassheim* test in its progeny cases.<sup>23</sup> It also introduces Alabama's abortion ban, the Human Life Protection Act, and Alabama's plan to extend the law's application extraterritorially.<sup>24</sup> Part III.A discusses how *Strassheim* is the correct test for courts to apply when tasked with determining whether states' extraterritorial application of their abortion bans is constitutional.<sup>25</sup> Part III.B argues that when applying the *Strassheim* test to Alabama's abortion ban, courts must conclude that it is unconstitutional for Alabama to prosecute out-of-state abortions.<sup>26</sup> Part III.C then notes that applying abortion bans extraterritorially is a new legal landscape.<sup>27</sup> Part IV thus concludes that when courts apply the *Strassheim* test to Alabama's intention to extend their abortion ban extraterritorially, it must be unconstitutional.<sup>28</sup>

## II. BACKGROUND

### A. State Criminal Jurisdiction and the *Strassheim* Test

#### 1. Defining Jurisdiction and Extraterritoriality

Jurisdiction grants a judicial body the authority to make legal decisions and answer legal questions.<sup>29</sup> A court's jurisdictional scope varies depending on the context.<sup>30</sup> Jurisdiction also provides a legal body with the right to exercise authority over criminal acts.<sup>31</sup> Usually, a state's constitution or a state statute grants a state's judiciary the authority to administer criminal laws.<sup>32</sup>

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22. See discussion *infra* Part II.A.

23. See discussion *infra* Parts II.A–C.

24. See discussion *infra* Part II.D.

25. See discussion *infra* Part III.A.

26. See discussion *infra* Part III.B.

27. See discussion *infra* Part III.C.

28. See discussion *infra* Part IV.

29. Christopher L. Blakesley, *United States Jurisdiction over Extraterritorial Crime*, 73 J. OF CRIM. L. & CRIMINOLOGY 1109 (1982).

30. *Id.*

31. Robert The, *State Criminal Jurisdiction*, 9 MALAYA L. REV. 38 (1967).

32. *Id.* See, e.g., Ala. Code § 15-2-1 (2024) (“Every person . . . is liable to punishment by the laws of Alabama for an offense committed in the state.”).

Criminal law is territorial, meaning the law applies to all persons within a territory.<sup>33</sup> The laws of the state where an individual commits a crime govern the crime's legal consequences.<sup>34</sup> In the United States, states generally only have authority to exercise jurisdiction over acts committed within their borders.<sup>35</sup> Based on this principle, if a man commits an assault in Detroit, only Michigan has the authority to prosecute the man for the crime. It does not matter if the man is an Ohio resident; the assault occurred in Michigan so only Michigan has jurisdiction over prosecution of the crime. In *Strassheim v. Daily*, the Supreme Court carved out a narrow exception to this general principle of territoriality.<sup>36</sup>

## 2. *Strassheim v. Daily*

In *Strassheim v. Daily*, the Supreme Court created an exception to the general principle that states cannot exercise criminal jurisdiction beyond their borders.<sup>37</sup> In 1908, Michigan's Jackson State Prison wanted to buy new machinery for its cordage plant and received state funds to purchase the machinery.<sup>38</sup> The prison placed its warden, Armstrong, in charge of the transaction.<sup>39</sup> Armstrong contracted with the Hoover and Gamble Company, through its agent Daily and secretary Eminger, to purchase the machinery.<sup>40</sup> The three men planned to substitute the new machinery with old secondhand machinery of lesser value and keep the extra money for themselves.<sup>41</sup> During the completion of the crime, Daily lived in Chicago and never set foot in Michigan.<sup>42</sup>

Michigan indicted Daily for bribery and false pretenses and requested Illinois hand Daily over so he could face prosecution in Michigan.<sup>43</sup> Daily contested Michigan's jurisdiction over him as none of his actions took place within Michigan, and filed a petition of habeas corpus, challenging Michigan's extradition request.<sup>44</sup> The Michigan district court judge held

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33. CHARLES DOYLE, CONG. RSCH. SERV., RS22497, EXTRATERRITORIAL APPLICATION OF AMERICAN CRIMINAL LAW: AN ABBREVIATED SKETCH (Mar. 21, 2023).

34. *Id.*

35. *See, e.g.,* Com. v. Armstrong, 897 N.E.2d 105, 109 (Mass. App. 2008) (stating "[c]riminal laws have no extraterritorial validity. They will not be enforced outside the jurisdiction of the sovereign by whose authority they are enacted.").

36. *Strassheim v. Daily*, 221 U.S. 280 (1911).

37. *Id.*

38. *Id.* at 282.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Strassheim*, 221 U.S. at 284.

43. *Id.* at 281.

44. *Id.*

the charge of false pretenses did not constitute a crime in Michigan, so Daily was not a fugitive from justice in Michigan.<sup>45</sup> The district judge reasoned that Daily was not evading punishment by remaining in Illinois because he had not committed a crime in Michigan.<sup>46</sup> The judge issued an order of habeas corpus, discharging Michigan's extradition order against Daily.<sup>47</sup> The State of Michigan appealed to the United States Supreme Court.<sup>48</sup>

The Supreme Court held that if a Michigan jury found Daily guilty, Michigan could punish him even though he had not set foot in the state until after the completion of the crime.<sup>49</sup> In making its decision, the Court created the framework for the detrimental effects test (the *Strassheim* test): "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a state in punishing the cause of the harm as if he had been present at the effect."<sup>50</sup> The Court then held defrauding the Michigan government made Daily a criminal under Michigan law because his actions produced detrimental effects within the state of Michigan.<sup>51</sup> In determining that there had been detrimental effects in Michigan, the Court reasoned:

If a jury should believe the evidence, and find that Daily did the acts that led Armstrong to betray his trust, deceived the board of control, and induced by fraud the payment by the state, the usage of the civilized world would warrant Michigan in punishing him, although he never had set foot in the state until after the fraud was complete.<sup>52</sup>

Accordingly, the Court found that Michigan's extraterritorial application of its fraud laws was constitutional because Daily's conduct produced detrimental effects in Michigan when he intentionally defrauded the Michigan government.<sup>53</sup>

Thus, the *Strassheim* test allows State A to punish acts done outside its jurisdiction, for example, acts performed in State B, so long as those

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45. *Id.*

46. *Id.*

47. *Id.*

48. *Strassheim*, 221 U.S. at 281.

49. *Id.* at 284–85.

50. *Id.* at 285.

51. *Id.* at 284–85.

52. *Id.*

53. *Id.*; See, e.g., *People v. Blume*, 505 N.W.2d 843, 844 (Mich. 1993) (holding that for a state to exercise extraterritorial jurisdiction, "knowledge alone is not enough," a defendant must commit the act with the "intent to have a detrimental effect" in that state).

acts actually produced a detrimental effect and an individual committed them intending to produce detrimental effects within State A.<sup>54</sup> For instance, if a man commits a crime in Michigan and Ohio wishes to exercise its jurisdiction over the act, it can do so only if the man intended the criminal act to produce and if the act actually did produce detrimental effects in Ohio. Accordingly, the *Strassheim* test became the exception to the general principle that states can only prosecute criminal acts that occur within their borders.<sup>55</sup>

Generally, states can only prosecute criminal acts that occur within their borders.<sup>56</sup> Under the common law, state jurisdiction is grounded by territorial limits.<sup>57</sup> In *Strassheim*, the Supreme Court created an exception to the general principle so that states may exercise jurisdiction over criminal acts that occur outside of their borders if the act produced or the actor intended to produce by committing the act, a detrimental effect within the state.<sup>58</sup>

*B. Strassheim's Effects Test reflects a good and sensible limitation on the exercise of extraterritorial jurisdiction*

The *Strassheim* test provides courts with the proper constitutional framework to analyze issues of extraterritorial jurisdiction.<sup>59</sup> The exercise of extraterritorial jurisdiction in limited circumstances dates to English common law.<sup>60</sup> Thus, it is reasonable for states to exercise extraterritorial jurisdiction in limited circumstances. However, it is important that the exercise of extraterritorial jurisdiction remains limited to specific circumstances.<sup>61</sup> Unlimited extraterritorial jurisdiction, without the *Strassheim* test's constraints, would allow for states to exercise

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54. *Strassheim*, 221 U.S. at 280.

55. *Id.* at 285.

56. FED. R. CRIM. P. 18 (stating that “[t]he government must prosecute an offense in a district where the offense was committed.”).

57. *State v. Dudley*, 581 S.E.2d 171, 176 (S.C. Ct. App. 2003), *aff'd*, 614 S.E.2d 623 (S.C. 2005) (explaining that “[c]ommon law has established ‘a territorial principle as the jurisdictional foundation for the reach of state laws’”).

58. *Strassheim*, 221 U.S. at 285.

59. *Id.*

60. *Ford v. U.S.*, 273 U.S. 593, 621 (1927) (discussing that the history of extraterritorial jurisdiction dates back to English common law. “In *Regina V. Garrett, Dearsly’s Crown Cases Reserved*, 232, 241, Lord Campbell said: ‘I do not proceed upon the ground that the offense was committed beyond the jurisdiction of the court’-which was the fact there-’for, if a man employ a conscious or unconscious agent in this country, he may be amenable to the laws of England, although at the time he was living beyond the jurisdiction.’”).

61. *Com. v. Armstrong*, 897 N.E.2d 105, 110 (Mass. App. 2008).

jurisdiction where all acts in furtherance of a crime occur outside their borders.<sup>62</sup>

Such an expansive view of extraterritorial jurisdiction could also allow a state to exercise jurisdiction over an act that is a crime in the state seeking extraterritorial jurisdiction but not in the state in which the act occurred. For example, under such an expansive view of extraterritorial jurisdiction, Kansas, where possession of marijuana is illegal, could prosecute its citizens who travel to Michigan, where marijuana is legal, for possessing legal marijuana in Michigan.<sup>63</sup>

The *Strassheim* test provides a sufficient, limited exception for states' exercise of extraterritorial jurisdiction.<sup>64</sup> Therefore, the *Strassheim* test provides a sufficient framework for courts to evaluate issues of extraterritoriality by limiting the application of extraterritorial jurisdiction to circumstances where an individual intends an act to produce, and the act actually does produce detrimental effects in the state seeking extraterritorial jurisdiction.<sup>65</sup>

### *C. Applying Strassheim's Effects Test*

Courts apply the *Strassheim* test when they consider whether a state may exercise extraterritorial jurisdiction. Under the *Strassheim* test, a court may only uphold a state's exercise of extraterritorial jurisdiction when the act(s) in question are intended to have and actually produce a detrimental effect within the state seeking jurisdiction.<sup>66</sup> Courts will look to a case's specific facts to determine whether the *Strassheim* exception applies.<sup>67</sup> This analysis results in one of two outcomes: (1) the state's exercise of extraterritorial jurisdiction is constitutional, meaning a court finds that the actor intended to produce *and* actually did produce detrimental effects in the state, or (2) the state's exercise of extraterritorial jurisdiction is unconstitutional, meaning a court finds the actor did not intend to produce *or* did not actually produce detrimental effects in the state (or both).<sup>68</sup> If a court finds (1) that the state's exercise of jurisdiction

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62. *Id.*

63. *See, e.g., Kansas Marijuana Laws 2024*, KAN. CANNABIS INFO., <https://kansasstatecannabis.org/laws> [<https://perma.cc/Z5TL-MEXL>] (last visited Apr. 14, 2024); Tom Angell, *Michigan Voters Approve Marijuana Legalization*, FORBES (Nov. 6, 2018, 11:30 PM), <https://www.forbes.com/sites/tomangell/2018/11/06/michigan-voters-approve-marijuana-legalization/?sh=5821604847a5> [<https://perma.cc/3WND-FJ58>].

64. *Strassheim*, 221 U.S. at 285.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*



was constitutional, the state can exercise extraterritorial jurisdiction and prosecute the individual for the crime.<sup>69</sup> If a court finds (2) that the state's exercise of extraterritorial jurisdiction was unconstitutional, the state cannot exercise extraterritorial jurisdiction and cannot prosecute the individual for the crime.<sup>70</sup>

### *1. Finding Extraterritorial Jurisdiction Constitutional*

Under the *Strassheim* test, a court will find a state's exercise of extraterritorial jurisdiction constitutional if the actor intended to produce *and* actually did produce detrimental effects in the state seeking extraterritorial jurisdiction.<sup>71</sup>

In *Rios v. State*, the Wyoming Supreme Court applied the *Strassheim* test and found Wyoming's exercise of extraterritorial jurisdiction constitutional.<sup>72</sup> In 1975, Jose Rios and his wife had their son Jesus Rios.<sup>73</sup> In 1980, the couple divorced.<sup>74</sup> The court awarded the mother primary custody of Jesus and gave Jose visitation rights.<sup>75</sup> The couple stipulated Jose would have custody during the summer.<sup>76</sup> In accordance with the custody agreement, during the summer of 1984, Jose had custody of his son in New Mexico.<sup>77</sup> In August 1984, the mother moved to Wyoming.<sup>78</sup> The custody agreement required Jose to return Jesus to Jesus' mother on August 18, 1984.<sup>79</sup> Jose did not return his son and Jesus' mother filed a criminal complaint in Wyoming.<sup>80</sup> In July 1985, police apprehended Jose as he tried to cross the Mexican border.<sup>81</sup>

The Wyoming Fourth Judicial District Court found Jose Rios guilty of interfering with child custody.<sup>82</sup> Jose appealed his guilty verdict, alleging Wyoming did not have jurisdiction as Rios had never been in the state.<sup>83</sup>

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69. *Id.*

70. *Strassheim*, 221 U.S. at 285.

71. *Id.*

72. *Rios v. State*, 733 P.2d 242, 250 (Wyo. 1987).

73. *Id.* at 243.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* at 243–44.

78. *Rios*, 733 P.2d at 244.

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.* at 243.

83. *Id.* at 244.

The Wyoming Supreme Court held that even though Jose had never set foot in Wyoming, the state could have jurisdiction over him.<sup>84</sup>

Jesus' mother, who had primary custody, moved to Wyoming.<sup>85</sup> Jose agreed to return Jesus to Jesus' mother in Wyoming.<sup>86</sup> Jose then failed to return his son to Wyoming; instead, Jose took Jesus to California where Jose hid Jesus from his mother for nearly a year.<sup>87</sup> The Wyoming Supreme Court reasoned that "given this combination of circumstances," Jose's actions produced detrimental effects within the state of Wyoming.<sup>88</sup> The Court further reasoned that Wyoming was entitled to jurisdiction because Jesus' mother lived in Wyoming and was the harmed party.<sup>89</sup>

In applying the *Strassheim* test, the Wyoming Supreme Court reasoned the facts of a given criminal act will determine whether there are concrete detrimental effects within a state such that it may exercise extraterritorial jurisdiction.<sup>90</sup> The Wyoming Supreme Court held that harm to a custodial parent is a detrimental effect in Wyoming, and Jose intended to create that detrimental effect when he refused to bring his son back to his son's custodial parent in Wyoming.<sup>91</sup> The Wyoming Supreme Court concluded the elements of the *Strassheim* test were satisfied and Wyoming could exercise extraterritorial jurisdiction.<sup>92</sup>

In *Heath v. Jones*, the Eleventh Circuit applied the *Strassheim* test.<sup>93</sup> The Eleventh Circuit held that a state may constitutionally exercise extraterritorial jurisdiction over acts that occur outside the state so long as the "criminal acts directly violate the peace, tranquility, and laws of a state."<sup>94</sup> Due to his desire to marry his girlfriend, Larry Heath arranged for the kidnapping and murder of his nine-month pregnant wife.<sup>95</sup> Heath hired two men and instructed them to kidnap his wife from her Alabama home and drive her car into a nearby creek, making her death appear to result from a car accident.<sup>96</sup> Instead, the two men kidnapped Heath's wife from her Alabama home, drove her to Georgia where they shot and killed her, then placed a brick on the gas pedal and sent her car into the woods.<sup>97</sup>

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84. *Rios*, 733 P.2d at 250.

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Rios*, 733 P.2d at 246.

91. *Id.* at 250.

92. *Id.*

93. *Heath v. Jones*, 941 F.2d 1126 (11th Cir. 1991).

94. *Id.* at 1139.

95. *Id.* at 1128.

96. *Id.* at 1129.

97. *Id.*

The state of Georgia indicted Heath, who pled guilty in exchange for a life sentence, taking the death penalty off the table.<sup>98</sup> Two months later, the state of Alabama indicted Heath with capital murder.<sup>99</sup> At his trial, a jury found Heath guilty and sentenced him to death.<sup>100</sup> Heath argued Alabama lacked jurisdiction as all elements of the murder occurred in Georgia.<sup>101</sup> Alabama argued that portions of the kidnapping-murder crime occurred in Alabama, and accordingly, the state had jurisdiction.<sup>102</sup> The Eleventh Circuit applied the *Strassheim* test and held that because Heath's acts violated the peace, tranquility, and laws of Alabama, Alabama may exercise jurisdiction over him, even if the murder itself occurred in Georgia.<sup>103</sup>

The court reasoned that because a portion of the kidnap-murder scheme occurred in Alabama—when the two hired men kidnapped Heath's wife from her home—Heath violated the peace and tranquility of Alabama.<sup>104</sup> The Eleventh Circuit explained that Alabama had established “a sufficient nexus” to obtain jurisdiction over Heath because the kidnapping occurred in Alabama.<sup>105</sup>

Therefore, the Eleventh Circuit applied the *Strassheim* test to allow extraterritorial jurisdiction where a criminal act occurred in State B, but directly violated the peace, tranquility, and laws of State A such that it created concrete detrimental effects within State A.<sup>106</sup> Thus, state A may exercise extraterritorial jurisdiction over the criminal act.<sup>107</sup>

## 2. Finding Extraterritorial Jurisdiction Unconstitutional

Under the *Strassheim* test, a court will find a state's exercise of extraterritorial jurisdiction unconstitutional if the actor did not intend to produce or did not actually produce detrimental effects in the state.<sup>108</sup>

In *People v. Blume*, the Michigan Supreme Court applied the *Strassheim* test and found no detrimental effects.<sup>109</sup> In *Blume*, the Michigan Supreme Court held Michigan's application of extraterritorial

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98. *Id.*

99. *Heath*, 941 F.2d at 1129.

100. *Id.*

101. *Id.* at 1138.

102. *Id.* at 1139.

103. *Id.*

104. *Id.*

105. *Heath*, 941 F.2d at 1139.

106. *Id.*

107. *Id.*

108. *Strassheim v. Daily*, 221 U.S. 280, 285 (1911).

109. *People v. Blume*, 505 N.W.2d 843 (Mich. 1993).

jurisdiction unconstitutional.<sup>110</sup> Michigan police officers arrested Randall Hoyt after discovering one kilogram of cocaine in his apartment.<sup>111</sup> Hoyt, a Michigan resident, stated that he purchased the cocaine in Florida from Michael Blume, a Florida resident.<sup>112</sup> During his only interaction with Hoyt, Blume sold the cocaine to Hoyt at a gym in Florida.<sup>113</sup> Michigan charged Blume with conspiracy to deliver cocaine.<sup>114</sup> Blume moved to dismiss the case for Michigan's lack of jurisdiction.<sup>115</sup>

The district court dismissed the case for lack of jurisdiction because it found no conspiracy occurred in Michigan.<sup>116</sup> On appeal, the Kalamazoo County Ninth Judicial Circuit Court reversed and found that Blume's actions intentionally produced detrimental effects in Michigan.<sup>117</sup> The Michigan Court of Appeals affirmed.<sup>118</sup> Blume appealed to the Michigan Supreme Court.<sup>119</sup>

The Michigan Supreme Court held that under the *Strassheim* test Michigan may exercise extraterritorial jurisdiction when acts done outside the state "are intended to have, and that actually do have, a detrimental effect" in Michigan.<sup>120</sup> The Michigan Supreme Court determined "the two key elements" of the *Strassheim* test "are specific intent to act and the intent that the harm occur in Michigan."<sup>121</sup> Applying the facts, the court determined Blume did not intend for the cocaine to be sold in Michigan, even though he knew that Hoyt would return there.<sup>122</sup> According to the court, Blume's mere knowledge that Hoyt may return to Michigan at some point was not enough to show that Blume intended to produce detrimental effects in Michigan when he sold Hoyt the cocaine in Florida.<sup>123</sup>

In *Blume*, the Michigan Supreme Court found Michigan's exercise of extraterritorial jurisdiction unconstitutional when applying the *Strassheim* test to the facts of the case.<sup>124</sup> Blume's "mere knowledge" that Hoyt would return to Michigan was "insufficient to support...[Blume] specifically

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110. *Id.* at 852.

111. *Id.* at 845.

112. *Id.*

113. *Id.* at 849–50.

114. *Id.* at 845.

115. *Blume*, 505 N.W.2d at 845.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at 845.

121. *Blume*, 505 N.W.2d at 846.

122. *Id.* at 850.

123. *Id.* at 850–51.

124. *Id.* at 846.

intended to have a detrimental effect in” Michigan.<sup>125</sup> The Michigan Supreme Court further elaborated on the *Strassheim* test, finding there must be “specific intent to act and...intent that the harm occur[s]” in the state seeking extraterritorial jurisdiction.<sup>126</sup>

In *Commonwealth v. Armstrong*, the Massachusetts Appeals Court applied the *Strassheim* test.<sup>127</sup> The court found that the *Strassheim* test did not allow a state to exercise extraterritorial jurisdiction when all elements of the crime occurred outside the state.<sup>128</sup> A Massachusetts trial judge found Gordon Armstrong guilty of seven counts of forcible rape of a child.<sup>129</sup> The victim often spent time at Armstrong’s house in Massachusetts playing with Armstrong’s sons.<sup>130</sup> Armstrong often raped the victim within the Massachusetts home.<sup>131</sup> While on a cross-country road trip to Oregon with his family and the victim, Armstrong raped the victim twice.<sup>132</sup>

On appeal, Armstrong claimed Massachusetts lacked jurisdiction over the two counts of rape that occurred outside Massachusetts.<sup>133</sup> The Massachusetts Appeals Court found that Massachusetts did not have jurisdiction over the two counts.<sup>134</sup> Using the *Strassheim* test, the Massachusetts Appeals Court determined that when an individual commits all acts in furtherance of a crime outside the state, these acts alone are not enough to show an intent to produce detrimental effects within the state.<sup>135</sup>

The Court stated that to hold otherwise would allow for too broad a reading of the *Strassheim* test, and that states cannot exercise extraterritorial jurisdiction when all elements of the offense occurred outside the state.<sup>136</sup> Accordingly, because the two rapes occurred entirely outside the state of Massachusetts, Massachusetts did not have jurisdiction over the two counts.<sup>137</sup>

In applying the *Strassheim* test, the Massachusetts Appeals Court determined that if all elements of the offense and all acts in furtherance of the crime occur wholly outside the state, that state cannot have extraterritorial jurisdiction because there can be no detrimental effect in

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125. *Id.* at 850–51.

126. *Id.* at 844.

127. *Com. v. Armstrong*, 897 N.E.2d 105 (Mass. App. 2008).

128. *Id.* at 110.

129. *Id.* at 107.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Armstrong*, 897 N.E.2d at 107.

134. *Id.* at 112.

135. *Id.* at 110.

136. *Id.*

137. *Id.* at 112.

Massachusetts.<sup>138</sup> Accordingly, in *Armstrong*, the Massachusetts Appeals Court interpreted the *Strassheim* test to hold that in order for Massachusetts to constitutionally exercise extraterritorial jurisdiction, at least some act in furtherance of a crime must occur in Massachusetts.<sup>139</sup>

In applying the *Strassheim* test, state courts will look to a case's facts to determine if an individual intended a criminal act to produce and the act actually did produce detrimental effects within a state. Under the *Strassheim* test, a court will determine whether the state may constitutionally exercise extraterritorial jurisdiction based on its analysis of such facts. Since the *Strassheim* test considers whether a state may act extraterritorially, courts must apply this test when considering states' ability to apply their abortion bans extraterritorially.<sup>140</sup>

#### *D. Alabama's Abortion Ban*

The Alabama Constitution declares that it is the state's public policy to protect "the sanctity of unborn life...including the right to life."<sup>141</sup> In 2019, Alabama enacted the Human Life Protection Act (the Act).<sup>142</sup>

The Act makes abortion and attempted abortions a felony offense, with exceptions only to protect the mother's life.<sup>143</sup> The Act makes abortion a Class A felony,<sup>144</sup> which, in Alabama, carries a sentence of imprisonment "for life or not more than 99 years or less than 10 years."<sup>145</sup> The Act does not provide for criminal or civil liability against the woman who has the abortion.<sup>146</sup> It does, however, allow for criminal and civil liability against those who perform the abortion or assist the woman in obtaining an abortion.<sup>147</sup>

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138. *Id.* at 110.

139. *Armstrong*, 897 N.E.2d at 110.

140. See generally David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 31–32 (2023) (describing how "an aggressive prosecutor" could use *Strassheim*'s effects test to prosecute an out-of-state abortion under new criminal abortion laws and laws granting fetal personhood).

141. ALA. CONST. art. 1, § 36.06.

142. ALA. CODE § 26-23H-1.

143. ALA. CODE § 26-23H-1.

144. ALA. CODE § 26-23H-6(a).

145. ALA. CODE § 13A-5-6.

146. ALA. CODE § 26-23H-5.

147. See *Frequently Asked Questions: Alabama's Abortion Ban*, ALA. POL'Y INST. (June 24, 2022), <https://alabamapolicy.org/2022/06/24/abortionfaq/> [https://perma.cc/XWH7-CRFD] (explaining that if someone mails a woman in Alabama abortion medication, "it would be up to the attorney general to locate who sent that, and . . . prosecute the person who sent that into the state . . . The person supplying the drug or the person performing the abortion could be prosecuted. The mother would not be prosecuted.").

Based on the Act and existing conspiracy law, Alabama contends it can exercise extraterritorial jurisdiction to prosecute individuals and organizations that assist women in obtaining an out-of-state abortion.<sup>148</sup> Under Alabama law:

A person is guilty of criminal conspiracy if, with the intent that conduct constituting an offense be performed, he or she agrees with one or more persons to engage in or cause the performance of the conduct, and any one or more of the persons does an overt act to effect an objective of the agreement.<sup>149</sup>

Alabama code also allows the state to indict individuals for a conspiracy, if the individuals form the intent in Alabama to commit a crime in another state.<sup>150</sup>

Initially, the United States District Court for the Middle District of Alabama issued a preliminary injunction prohibiting Alabama from enforcing the Act as applied to pre-viability abortions, finding the Act unconstitutional under existing Supreme Court precedent.<sup>151</sup> However, after the Supreme Court's decision in *Dobbs*, the United States District Court for the Middle District of Alabama dissolved the preliminary injunction and allowed the Act to take effect.<sup>152</sup>

In an interview, Alabama Attorney General Steve Marshall stated that under current law, Alabama could prosecute individuals and organizations that assist pregnant Alabama residents in leaving the state to have an abortion.<sup>153</sup> In response to Marshall's comments, abortion providers filed a lawsuit in the United States District Court for the Middle District of Alabama alleging that Alabama's enforcement of the law violates the constitutional right to travel, the Fourteenth Amendment's Due Process Clause, and intrudes upon the sovereignty of states where abortion is legal, among other rights.<sup>154</sup>

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148. Defendant's Motion to Dismiss, *Yellowhammer Fund v. Marshall*, No. 2:23-cv-00450-MHT-KFP (M.D. N. Ala. Aug. 28, 2023).

149. ALA. CODE § 13A-4-3(a).

150. ALA. CODE § 13A-4-4.

151. *Robinson v. Marshall*, 415 F. Supp. 3d 1053, 1060 (M.D. Ala. 2019).

152. *Robinson v. Marshall*, No. 2:19CV365-MHT, 2022 WL 2314402, at \*1 (M.D. Ala. June 24, 2022).

153. Josh Moon, *Alabama AG: State May Prosecute Those Who Assist in Out-of-State Abortions*, ALA. POL. REP. (Sept. 15, 2022, 6:30 AM), <https://www.alreporter.com/2022/09/15/alabama-ag-state-may-prosecute-those-who-assist-in-out-of-state-abortions/> [<https://perma.cc/M8EB-MXZL>].

154. Heidi Miller, *Abortion Fund Sues Alabama Attorney General After He Threatens Criminal Prosecution for Helping Abortion Seekers Leave the State*, YELLOWHAMMER FUND (July 31, 2023), <https://www.yellowhammerfund.org/abortion-fund-sues-alabama->

In *Yellowhammer Fund v. Marshall*, Marshall reaffirmed the state's ability to extend its abortion ban beyond its borders due to the state's interest in preserving life.<sup>155</sup> Marshall alleged that because abortion is a crime in Alabama, the state could prosecute an individual or organization, such as an abortion provider, under Alabama conspiracy law for "conspiring" in the state to have or assist in having an abortion out of the state.<sup>156</sup>

For example, an Alabama resident finds herself pregnant and wishes to have an abortion. Her friend, also an Alabama resident, assists her in booking an appointment to have an abortion in New York, where abortion is legal.<sup>157</sup> According to Marshall's argument, the pregnant woman and her friend formed a conspiracy to intentionally violate Alabama law by having an abortion in another state.<sup>158</sup> Under Alabama law, the pair formed a criminal conspiracy because it is illegal to have an elective abortion in Alabama.<sup>159</sup> While the state cannot prosecute the pregnant woman under the Act as it is currently written,<sup>160</sup> Alabama could prosecute the friend under the Act, and it likely intends to do so in future cases.<sup>161</sup>

While the Alabama Attorney General's argument is a novel one, it likely lays the foundation for the next abortion regulation battleground.

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attorney-general/ [https://perma.cc/T8AQ-QFH9]. See also Nathaniel Weixel, *Judge to Rule Whether Alabama Can Prosecute People Who Aid Out-of-State Abortions*, THE HILL (August 9, 2024, 6:00 AM), <https://thehill.com/policy/healthcare/4819697-alabama-abortion-providers-prosecuted/> [https://perma.cc/58EQ-H54J] (discussing how because of the Human Life Protection Act, abortion providers in Alabama discontinued their "support for out-of-state abortions until [they] can be assured that [they] will not face criminal prosecution for doing so.").

155. Defendant's Motion to Dismiss, *Yellowhammer Fund v. Marshall*, No. 2:23-cv-00450-MHT-KFP (M.D. N. Ala. Aug. 28, 2023).

156. *Id.* See also Cohen, *supra* note 140, at 33 (explaining in a post-*Roe* world a "point of contention would be whether a state can criminalize a conspiracy to commit an act that is legal in the destination state but illegal in the home state.").

157. *Tracking Abortion Bans Across the Country*, N.Y. TIMES (Nov. 7, 2023, 9:15 PM), <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> [https://perma.cc/WHA5-M54B] ("[New York] state law protects abortion. In 2022, the governor signed several bills to shield patients and providers from laws in other states.").

158. *Id.*

159. *Id.*

160. ALA. CODE § 26-23H-5.

161. Defendant's Motion to Dismiss, *Yellowhammer Fund v. Marshall*, No. 2:23-cv-00450-MHT-KFP (M.D. N. Ala. Aug. 28, 2023). See also Maureen Groppe, *Alabama is a Test Case for Efforts to Help Women Get Abortions in States Where it's Legal*, USA TODAY (August 27, 2024, 2:48 PM), <https://www.usatoday.com/story/news/politics/2024/08/27/alabama-prosecute-out-of-state-abortion/74954337007/> [https://perma.cc/BYU2-XZNV] (explaining other states would likely pass laws restricting out-of-state abortions if Marshall's argument is successful in *Yellowhammer Fund v. Marshall*).



States will likely attempt to extraterritorially apply their laws that criminalize abortion. A court should apply the *Strassheim* test, however, to prevent states from extending their abortion bans extraterritorially.

### III. ANALYSIS

#### *A. The Strassheim Test is the Legal Precedent for Courts to Analyze Issues of States Exercising Extraterritorial Jurisdiction of their Abortion Bans*

*Strassheim's* test is legal precedent for cases that consider the constitutionality of a state's abortion laws, like Alabama's near-total abortion ban.<sup>162</sup> As abortion is now illegal in Alabama, a woman will have to travel out of the state if she wishes to have an abortion.<sup>163</sup> In *Yellowhammer Fund v. Marshall*, Alabama's Attorney General raises the claim that Alabama can prosecute "conspiracies" to procure an abortion that would be illegal in Alabama, even though the abortion itself occurs outside Alabama.<sup>164</sup> Therefore, Alabama is seeking to prosecute those who help procure an abortion under its conspiracy law.<sup>165</sup>

These prosecutions raise questions of applicability of extraterritorial jurisdiction in two ways. First, the abortion, which is illegal in Alabama, is performed in another state, where abortion is legal.<sup>166</sup> Second, Alabama is seeking to extend the reach of its near-total abortion ban outside its borders.<sup>167</sup> Accordingly, the type of prosecutions Alabama seeks to bring

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162. *Strassheim v. Daily*, 221 U.S. 280, 280 (1911); ALA. CODE § 26-23H-4.

163. ALA. CODE § 26-23H-4 ("It shall be unlawful for any person to intentionally perform or attempt to perform an abortion."). See also Kimya Forouzan et al., *The High Toll of US Abortion Bans: Nearly One in Five Patients Now Traveling Out of State for Abortion Care*, GUTTMACHER INST. (December 7, 2023), <https://www.guttmacher.org/2023/12/high-toll-us-abortion-bans-nearly-one-five-patients-now-traveling-out-state-abortion-care> [<https://perma.cc/F2Y7-LQTN>] (explaining that in 2020 one in ten women had to travel out of state for an abortion, but in the first half of 2023, one in five women had to travel out of state for an abortion. This increase in out of state travel for abortion directly related to the Supreme Court's decision in *Dobbs v. Whole Women's Health Org.*).

164. Defendant's Motion to Dismiss, *Yellowhammer Fund v. Marshall*, No. 2:23-cv-00450-MHT-KFP at \*17 (M.D. N. Ala. Aug. 28, 2023).

165. *Id.*

166. ALA. CODE § 26-23H-1.

167. Defendant's Motion to Dismiss, *Yellowhammer Fund v. Marshall*, No. 2:23-cv-00450-MHT-KFP at \*17 (M.D. N. Ala. Aug. 28, 2023). See also Ruth Marcus, *Want to Know What Post-Roe America Looks Like? Just Look at Alabama*, WASH. POST (Sept. 6, 2023, 5:03 PM), <https://www.washingtonpost.com/opinions/2023/09/06/post-roe-america-alabama-murder/> [<https://perma.cc/Y7FM-QJWA>] (discussing how Alabama is working to create a new legal landscape for abortion bans in post-*Roe* America).

raise an extraterritorial jurisdiction issue, thus requiring a court to apply the *Strassheim* test.<sup>168</sup>

*B. Applying Strassheim to Alabama's Abortion Ban and Extraterritoriality*

When applying *Strassheim* to Alabama's Human Life Protection Act, a court must determine whether an abortion that took place outside of Alabama "intended to produce and produc[ed] detrimental effects within" Alabama.<sup>169</sup> Under *Strassheim*, for a state to obtain extraterritorial jurisdiction the actor it is seeking jurisdiction over must both intend to produce and actually produce detrimental effects in the state.<sup>170</sup> For Alabama to exercise extraterritorial jurisdiction in prosecuting an individual who helps procure an out-of-state abortion under its abortion ban, the person must both (1) intend to produce detrimental effects in Alabama and (2) actually produce detrimental effects in Alabama.<sup>171</sup> A court determining whether Alabama can exercise extraterritorial jurisdiction here must apply the two-part *Strassheim* test.<sup>172</sup>

A court should first determine whether an individual who has an abortion or procures an abortion outside of Alabama *intended* to produce detrimental effects in Alabama.<sup>173</sup> After comparing an individual who has an abortion, or procures an abortion, with the facts and holdings of other *Strassheim* progeny cases,<sup>174</sup> a court should find that an individual who has an abortion, or procures an abortion, outside of Alabama did not *intend* to produce detrimental effects in Alabama.

In *Heath v. Jones*, the Eleventh Circuit found Heath intended to hire men to kidnap and kill his wife.<sup>175</sup> The court found, in plotting to conduct a murder for hire, Heath intentionally produced detrimental effects in the state.<sup>176</sup> Further, in *Rios v. State*, the Wyoming Supreme Court reasoned that Jose Rios intentionally failed to return his child to the child's custodial

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168. *Strassheim v. Daily*, 221 U.S. 280, 285 (1911).

169. *Id.*

170. *Id.*

171. *Id.*; ALA. CODE § 26-23H-1.

172. *Strassheim*, 221 U.S. at 285.

173. *Id.*

174. In *Strassheim v. Daily* and its progeny cases, the act in question was illegal in both states involved. Compare *People v. Nevelik*, 491 P.3d 492 (Colo. App. 2021) (involving money laundering) and *People v. Chase*, 411 P.3d 740 (Colo. App. 2013) (involving stalking and harassment) with extraterritorial disputes surrounding abortion, abortion is legal in the state where it is performed but illegal in the state seeking jurisdiction. This introduces a new legal landscape and constitutional questions.

175. *Heath v. Jones*, 941 F.2d 1126, 1138 (11th Cir. 1991).

176. *Id.* at 1139.

parent.<sup>177</sup> On the other hand, in *People v. Blume*, the Michigan Supreme Court held that Blume's knowledge that Hoyt would likely return to Michigan after Blume sold him cocaine was insufficient to show Blume intended for there to be detrimental effects in Michigan.<sup>178</sup>

A court should find that abortion is much more analogous to *Blume* than *Heath* or *Rios*.<sup>179</sup> A woman who helps an Alabama resident receive an abortion in another state, where abortion is legal, will likely know that the woman seeking an abortion in a legal state is an Alabama resident and will likely return to Alabama. However, as in *Blume*, knowledge that a woman will travel out of the state to have an abortion and then return to Alabama is insufficient to show the woman who helped procure the abortion intended detrimental effects in Alabama.

To illustrate with an example: Individual A, an Alabama resident, becomes pregnant and decides to have an abortion. Individual B, also an Alabama resident, helps Individual A book a plane ticket to Michigan, where abortion is legal.<sup>180</sup> Individual A travels to Michigan, has a legal abortion, and returns to Alabama. The state of Alabama then charges Individual B with conspiracy to violate its abortion ban.<sup>181</sup> In applying the *Strassheim* test, a court should find that Individual B did not intend to produce detrimental effects within the state of Alabama. Individual B's mere knowledge that Individual A would travel to Michigan does not rise to the level of intent to produce detrimental effects within the state of Alabama.

Alabama code defines an abortion as "the use...of any instrument, medicine, [or] drug...with the *intent* to terminate the pregnancy of a woman known to be pregnant with knowledge that the termination by those means will with reasonable likelihood cause the death of the unborn

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177. *Rios v. State*, 733 P.2d 242, 243 (Wyo. 1987).

178. *People v. Blume*, 505 N.W.2d 843, 850–51 (Mich. 1993).

179. *Compare Blume*, 505 N.W.2d 843 (rejecting extraterritorial jurisdiction because the Florida drug transaction did not produce detrimental effects in Michigan), *with Heath*, 941 F.2d 1126 (holding a murder and kidnap plot produced detrimental effects in both states and warranted Alabama's exercise of extraterritorial jurisdiction) *and Rios*, 733 P.2d 242 (holding that withholding a child from their custodial parent produced detrimental effects in the custodial parent's state of residence, warranting Wyoming exercising extraterritorial jurisdiction).

180. Clara Hendrickson, *Proposal 3: Michigan Voters Embrace Abortion Rights Amendment*, DETROIT FREE PRESS (Nov. 9, 2022, 3:38 AM), <https://www.freep.com/story/news/politics/elections/2022/11/09/proposal-3-michigan-results/69599515007/> [https://perma.cc/TU4X-T958]. Abortion is legal in the state of Michigan. In November 2022, Michigan voters approved an amendment to the state constitution protecting abortion rights. *See* MI. CONST. art. I § 28 ("Every individual has a fundamental right to reproductive freedom, which entails the right to make and effectuate decisions about . . . abortion care. . . .")

181. ALA. CODE § 26-23H-1.

child.”<sup>182</sup> Thus, Alabama code requires intent in criminalizing abortion.<sup>183</sup> A woman who has an abortion or an individual who helps procure an abortion certainly intends for an abortion to occur. However, intent to commit the act alone is simply not enough to produce detrimental effects.<sup>184</sup>

To compare, recreational marijuana is illegal in Alabama.<sup>185</sup> Alabama residents cannot possess or use marijuana for personal use in the state.<sup>186</sup> Possession of marijuana for personal use is a Class A misdemeanor in Alabama.<sup>187</sup> A Class A misdemeanor is punishable for a term of imprisonment of up to one year.<sup>188</sup> In many states, however, recreational marijuana is legal.<sup>189</sup> If Individual B helps Individual A book a plane ticket to Michigan, knowing Individual A intends to purchase and use recreational marijuana, Individual B does not intend to produce detrimental effects in Alabama.<sup>190</sup> Individual B simply possesses the knowledge that Individual A will travel to Michigan and engage in legal activity, and therefore, cannot intend to produce detrimental effects in Alabama.<sup>191</sup>

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182. ALA. CODE § 26-23H-3 (emphasis added).

183. *Id.*

184. *Strassheim v. Daily*, 221 U.S. 280, 285 (1911); *People v. Blume*, 505 N.W.2d 843 (Mich. 1993).

185. *Alabama*, MARIJUANA POL’Y PROJECT, <https://www.mpp.org/states/alabama/> [https://perma.cc/X7EY-9T2Z] (last visited Apr. 14, 2024).

186. ALA. CODE § 13A-12-214 (2024) (“A person commits the crime of unlawful possession of marihuana in the second degree if . . . he possesses marihuana for his personal use only.”).

187. *Id.*

188. ALA. CODE § 13A-5-7 (2024) (“Sentences for misdemeanors shall be a definite term of imprisonment . . . within the following limitations: (1) For a Class A misdemeanor, not more than one year.”).

189. Alex L. Matthews & Christopher Hickey, *US States are Regulating Marijuana. See Where it’s Legal Across the Country*, CNN (Nov. 7, 2023, 9:35 PM), <https://www.cnn.com/us/us-states-where-marijuana-is-legal-dg/index.html> [https://perma.cc/EU6F-P6MK].

190. MICH. COMP. LAWS § 333.27955 (2018). Specifically, MICH. COMP. LAWS §§333.27955(1)(a)–(d) allows for persons over age 21 to purchase, possess, and use marijuana. *Id.*

191. While outside the scope of this Note, Alabama’s desire to prosecute out-of-state abortions via its conspiracy law will likely raise constitutional issues regarding a woman’s right to travel. *See* Statement of Interest of the United States in Support of Plaintiff’s Right to Travel Claim, *Yellowhammer Fund v. Marshall*, No. 2:23-cv-00450-MHT-KFP (M.D. N. Ala. Aug. 28, 2023). The Department of Justice identified that “the right to travel is so fundamental that it is one of the rights of national citizenship also protected by the Fourteenth Amendment’s Privileges or Immunities Clause” and Alabama’s attempt to apply its abortion ban extraterritorially to those who assist women in traveling out-of-state “severely undercut the right to travel itself” *Id.* at 1–2.

Just as in *Blume*, an individual with mere knowledge that an Alabama resident would travel to another state to have an abortion does not have the intent to produce detrimental effects in Alabama.<sup>192</sup> The individual simply intends for the pregnant person to travel out of Alabama and engage in legal activities in another state.<sup>193</sup>

The court must then consider whether the out-of-state abortion actually did produce detrimental effects in Alabama.<sup>194</sup> In contrast with *Strassheim* and its progeny cases, Alabama is seeking extraterritorial jurisdiction over an act that is legal in the state in which it occurs.<sup>195</sup> Accordingly, because the abortion is occurring in a state where it is legal, it can never produce detrimental effects in Alabama, even if “procurement” happens in the state.<sup>196</sup>

To continue the comparison to recreational marijuana, an Alabama resident who travels to a state where marijuana is legal does not produce detrimental effects in Alabama when they use marijuana legally in, for example, Michigan.<sup>197</sup> While an Alabama resident may engage in “marijuana procurement” when they purchase a plane ticket to Michigan, knowing they will use marijuana there, this act would not produce detrimental effects in Alabama. The individual is using the substance legally in Michigan, even if the individual booked the plane ticket in Alabama, where marijuana is illegal. Therefore, because the abortion itself is occurring completely legally in another state, it cannot produce detrimental effects in Alabama.

A court should find that a woman traveling to another state to have an abortion or an individual helping her do so, can never produce detrimental effects in Alabama. The abortion is not occurring in the state of Alabama; while Alabama may argue that abortion “procurement” is happening in the state, this is not sufficient to produce detrimental effects in Alabama.

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192. *Strassheim v. Daily*, 221 U.S. 280, 285 (1911).

193. Statement of Interest of the United States in Support of Plaintiff’s Right to Travel Claim at 21, *Yellowhammer Fund v. Marshall*, No. 2:23-cv-00450-MHT-KFP (M.D. N. Ala. Aug. 28, 2023) (“A state that criminalized gambling could go further and prevent its residents from assisting with travel to casinos in Mississippi or Nevada, based solely on its policy disagreement with those states on that issue.”).

194. *Strassheim*, 221 U.S. at 285.

195. See C. Steven Bradford, *What Happens If Roe Is Overruled? Extraterritorial Regulation of Abortion by the States*, 35 ARIZ. L. REV. 87, 132 (1993) (“[T]he conduct in *Strassheim* is different from an extraterritorial abortion in an important respect. Daily’s conduct in *Strassheim*, bribery, was probably also illegal where it occurred. The abortion would be legal where performed. This might make a difference”).

196. *Fund Texas Choice v. Paxton*, 658 F.Supp.3d 377, 400 (W.D. Tex. 2023).

197. MICH. COMP. LAWS § 333.27955 (2018).

Further, an abortion itself can never produce detrimental effects. The fact that abortion is legal in the state in which it occurs indicates that an abortion can never produce detrimental effects in the state seeking extraterritorial jurisdiction. Rather, abortion, arguably, has positive effects.

For example, legal abortion has positive impacts on maternal health.<sup>198</sup> A woman's risk of dying during childbirth is approximately 14 times higher than dying from abortion complications.<sup>199</sup> Abortion bans increase pregnancy-related deaths, with disproportionate impacts on minority populations.<sup>200</sup> Legal abortion also improves women's livelihoods.<sup>201</sup> For example, access to legal abortion leads to significant increases in high school graduation and college admission rates.<sup>202</sup>

On the other hand, women who are unable to access a wanted abortion are more likely to experience physical domestic violence and are more likely to live in poverty.<sup>203</sup> Women who were unable to access a wanted abortion saw an 81 percent increase in bankruptcy, eviction, and tax liens.<sup>204</sup>

Legal abortion also arguably has positive impacts on children and their futures.<sup>205</sup> Children born as the result of abortion denial are more likely to

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198. See generally *The Turnaway Study*, ADVANCING NEW STANDARDS REPRODUCTIVE HEALTH, <https://www.ansirh.org/research/ongoing/turnaway-study> [https://perma.cc/3BPC-82KD] (last visited Apr. 15, 2024).

199. Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion and Childbirth in the United States*, 119 OBSTETRICS & GYNECOLOGY 215, 215 (2012) (finding there was 8.8 deaths per 100,000 live births but only 0.6 deaths per 100,000 abortions).

200. Amanda J. Stevenson, *The Pregnancy-Related Mortality Impact of a Total Abortion Ban in the United States: A Research Note on Increased Deaths Due to Remaining Pregnant*, 58 DEMOGRAPHY 2019, 2019 (2021) (evaluating the effects of a hypothetical nationwide ban on abortion, researchers found in the year following pregnancy-related deaths would increase by 21 percent. For black women, however, pregnancy-related deaths would increase by 33 percent in the years following a nationwide abortion ban.).

201. See *The Turnaway Study*, *supra*, note 198.

202. Brief for Ywca USA, Girls Inc., Supermajority Education Fund, & United State of Women as Amici Curiae Supporting Respondents, *Dobbs v. Jackson Whole Women's Health Org.*, 142 S. Ct. 2228 (2022) (No. 19-1392).

203. Hope Sheils, *Overturning Roe is a Poverty Issue*, GEO. J. ON POVERTY L. & POL'Y: BLOG (Oct. 14, 2022), <https://www.law.georgetown.edu/poverty-journal/blog/overturning-roe-is-a-poverty-issue/> [https://perma.cc/2RR4-R5NY].

204. *Id.*

205. *Women's Access to Abortion Improves Children's Lives*, ADVANCING NEW STANDARDS REPRODUCTIVE HEALTH (Jan. 2019), [https://www.ansirh.org/sites/default/files/publications/files/womens\\_access\\_to\\_abortion\\_improves\\_childrens\\_lives.pdf](https://www.ansirh.org/sites/default/files/publications/files/womens_access_to_abortion_improves_childrens_lives.pdf) [https://perma.cc/NH5D-H84N].

live below the federal poverty level.<sup>206</sup> Existing children of women denied an abortion are three times more likely to live in poverty, lack access to basic necessities, and are less likely to achieve development milestones.<sup>207</sup> Further, children born to women forced to carry a pregnancy to term were more likely to end up in the foster care system.<sup>208</sup>

Therefore, the fact that access to legal abortion has substantial, positive effects on women, their children, and society in general further supports that abortion can never have a detrimental effect. An abortion performed legally in one state can, then, never have detrimental effects in a state where abortion is illegal.

Thus, using the *Strassheim* test, a court should find Alabama Attorney General Marshall's claim that the Alabama conspiracy law can be used to prosecute abortions occurring outside Alabama lacks sufficient justification for exercising extraterritorial jurisdiction.<sup>209</sup> A court should hold Alabama's exercise of extraterritorial jurisdiction unconstitutional under *Strassheim* because an individual who helps procure a legal abortion that occurs outside Alabama does not intend to and does not actually produce detrimental effects within Alabama.

Accordingly, a court should find Alabama falls short of the requirements for extraterritorial jurisdiction in this context.<sup>210</sup> Applying the *Strassheim* test leads to the result that Alabama abortion bans as applied to reach extraterritorially are unconstitutional. Courts have only applied *Strassheim* and its progeny in instances where the action in question was illegal in both states. Accordingly, abortion bans create a new legal question: how should courts consider *Strassheim* in the context of an abortion that is legal in the state where it is performed but illegal in the state seeking to exercise extraterritorial jurisdiction?<sup>211</sup>

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206. *Id.*

207. *Id.*

208. Savannah Adkins et al., *Association Between Restricted Abortion Access and Child Entries into the Foster Care System*, 178 JAMA PEDIATRICS 37 (2024) (finding there was an 11% increase in children placed in foster care in states that restricted abortion access).

209. Defendant's Motion to Dismiss, *Yellowhammer Fund v. Marshall*, No. 2:23-cv-00450-MHT-KFP (M.D. N. Ala. Aug. 28, 2023).

210. Samantha Mitchell, *First Amendment Speech Protections in A Post-Dobbs World: Providing Instruction on Instructional Speech*, 91 FORDHAM L. REV. 1521, 1530 (2023) (explaining "that states could plausibly argue that conduct that aids abortion results in harm within the state by killing [fetal] persons," while noting that these arguments "would likely turn on whether the fetal personhood laws hold up in court.").

211. Bradford, *supra* note 195.

*C. Extraterritorial Application of State Abortion Bans is New Legal Context*

While *Strassheim* is the correct framework to apply when determining the constitutionality of the extraterritorial application of a state's abortion restrictions,<sup>212</sup> it is important to note this new legal context.<sup>213</sup> After *Dobbs v. Jackson's Whole Women's Health Org.*, the United States has transformed into two distinct legal landscapes: states where abortion is legal and states where it is not.<sup>214</sup> Questions regarding the application of extraterritorial jurisdiction will face a new legal landscape—how to apply the *Strassheim* test where the abortion, the act purported to produce detrimental effects in one state, is legal in the state where the abortion is performed.<sup>215</sup>

In *Strassheim* and its progeny, regardless of how a court applied the test, the act in question was illegal in both states involved.<sup>216</sup> For example, in *People v. Blume*, the Michigan Supreme Court found there were no detrimental effects in Michigan.<sup>217</sup> The act in question—"conspiracy to deliver or possession with intent to deliver" cocaine—is illegal in both

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212. *Strassheim v. Daily*, 221 U.S. 280 (1911).

213. See generally Geoff Mulvihill & John Hanna, *Next Abortion Battles May Cross State Borders*, ASSOCIATED PRESS (Apr. 10, 2023, 10:53 AM), <https://apnews.com/article/abortion-trafficking-state-legislature-border-5fc92621bcd0d7f018d95dd15d6f98c> [<https://perma.cc/AA3V-NTMP>] (explaining that there is no legal precedent that gives sufficient guidance on whether states can prevent their residents from getting out-of-state abortions. Mary Ziegler, a legal historian, stated "[i]f red states pass laws saying, 'We can go after people for X, Y and Z,' and blue states say, 'You can't,' we're in uncharted territory.'").

214. Lawrence O. Gostin & Rebecca Reingold, *Two Americas After the Fall of Roe: There Will be Severe Consequences for Women's Health and the Doctor-Patient Relationship*, MEDPAGETODAY (June 27, 2022), <https://www.medpagetoday.com/opinion/the-health-docket/99465?trw=no> [<https://perma.cc/Y75N-HDUH>] (explaining roughly half of all U.S. states ban abortion after the Supreme Court's decision in *Dobbs*, creating two different Americas for women seeking abortion care). See also KFF, *Abortion in the United States*, <https://www.kff.org/womens-health-policy/press-release/abortion-in-the-united-states/> [<https://perma.cc/7DB3-QFQR>] (last updated Jan. 9, 2024) (explaining "access to safe legal abortions now depends on where you live and the national divide in access to abortion care has been intensified" in the wake of *Dobbs*).

215. *Strassheim*, 221 U.S. at 285. See also Cohen, *supra* note 136, at 32 (explaining that if a state grants fetal personhood, the effects test "could result in myriad criminal prosecutions related to out-of-state abortions" but notes that it will be "a complicated jurisdictional issue" whether courts will allow states to prosecute an act that is lawful out-of-state).

216. *Strassheim*, 221 U.S. 280. See also Bradford, *supra* note 195.

217. *People v. Blume*, 505 N.W.2d 843, 844 (Mich. 1993).



Michigan and Florida.<sup>218</sup> Additionally, in *Heath v. Jones*, the Eleventh Circuit found under the *Strassheim* test that there were detrimental effects in Alabama.<sup>219</sup> The acts in question—kidnapping and murder—were illegal in both Alabama and Georgia.<sup>220</sup>

This new legal landscape will raise more issues than just extraterritoriality,<sup>221</sup> but when considering questions of extraterritoriality, courts should use *Strassheim* to guide them.<sup>222</sup> Courts should use *Strassheim* to reach the conclusion that an abortion performed in a state in which it is legal cannot produce detrimental effects in a state where abortion is illegal, and an individual who helps a pregnant woman have an abortion in a legal state cannot intend to produce detrimental effects in a state where abortion is illegal.

#### IV. CONCLUSION

In overturning *Roe v. Wade*, the Supreme Court opened the door to a new legal landscape in the United States.<sup>223</sup> Access to reproductive health services, like abortion, now depend heavily on the state in which a woman lives.<sup>224</sup> Some states ban and criminalize abortion, while others protect

218. *Id.* at 845. Both Michigan and Florida law make it a criminal offense to deliver or possess controlled substances with the intent to deliver. *See* MICH. COMP. LAWS § 333.7401(1) (1992) (“[A] person shall not . . . deliver, or possess with intent to . . . deliver a controlled substance . . .”); FLA. STAT. ANN. § 893.13(1)(a) (1992) (“[I]t is unlawful for any person to . . . deliver, or possess with intent to . . . deliver, a controlled substance”).

219. *Heath v. Jones*, 941 F.2d 1126, 1139 (11th Cir. 1991).

220. *Id.* at 1129. Both Alabama and Georgia criminalize murder and kidnapping. *See* ALA. CODE § 13A-5-40 (a)(1) (2019) “Murder . . . during a kidnapping”); GA. CODE ANN. § 16-5-1 (West 2014) (“[C]ommits the offense of murder”); GA. CODE ANN. § 16-5-40 (West 2023) (“[C]ommits the offense of kidnapping”).

221. *See generally*, Mabel Felix et. al., *Legal Challenges to State Abortion Bans Since the Dobbs Decision*, KFF (Jan. 20, 2023), <https://www.kff.org/womens-health-policy/issue-brief/legal-challenges-to-state-abortion-bans-since-the-dobbs-decision/> [<https://perma.cc/S473-ASQ7>] (explaining there have been three broad challenges to state abortions bans: constitutional challenges, health care amendment challenges, and religious freedom challenges); Statement Of Interest of the United States in Support of Plaintiff’s Right to Travel Claim at 7, *Yellowhammer Fund v. Marshall*, No. 2:23-cv-00450-MHT-KFP (M.D. N. Ala. Aug. 28, 2023) (“[The] right to engage in lawful conduct includes the right to obtain a legal abortion in another state, as binding precedent and fundamental constitutional principles both confirm. Moreover, not only do states lack authority to directly prohibit travel across state lines, but states also cannot prevent third parties from providing assistance to individuals who are seeking to exercise their right to travel. And laws that have the purpose of impeding, deterring, or chilling interstate travel are likewise unconstitutional.”).

222. *Strassheim v. Daily*, 221 U.S. 280 (1911).

223. *See* Marcus, *supra* note 167.

224. Damante, *supra* note 5.

access to legal abortion.<sup>225</sup> This new legal landscape creates issues of extritoriality and whether states can extend their abortion laws beyond their borders.

In *Strassheim v. Daily*, the Supreme Court created a sufficient limit on states' ability to apply their laws extritoriality.<sup>226</sup> In holding that states can only apply their laws extritoriality when the act at issue is intended to produce and actually does produce detrimental effects in the state seeking jurisdiction, the Supreme Court sufficiently limited the context in which states can extend their laws beyond their borders.<sup>227</sup>

Alabama can prohibit women from obtaining an abortion within the state of Alabama and has done so with its near-total ban on abortion.<sup>228</sup> However, despite Alabama Attorney General Marshall's claim that the state can extend its abortion bans beyond its borders by using conspiracy laws, courts should use *Strassheim* and its progeny to prevent Alabama from this exercise of extraterritorial jurisdiction.<sup>229</sup>

An abortion performed outside of Alabama, in a state where abortion is legal, cannot produce detrimental effects within Alabama, and the individual who procures the abortion cannot intend to produce detrimental effects within Alabama. Decades of *Strassheim* progeny precedent support this conclusion.<sup>230</sup>

Accordingly, in the new post-*Roe* legal landscape, courts should apply *Strassheim* to prevent anti-abortion states from extending their abortion bans beyond their borders through application of extritoriality and ensure and protect women's access to reproductive health services in states where abortion is legal, regardless of the woman's state of residence.<sup>231</sup>

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225. *Id.*

226. *Strassheim*, 221 U.S. 280.

227. *Id.* at 285.

228. ALA. CODE § 26-23H-1.

229. Defendant's Motion to Dismiss, *Yellowhammer Fund v. Marshall*, No. 2:23-cv-00450-MHT-KFP (M.D. N. Ala. Aug. 28, 2023); *Strassheim*, 221 U.S. 280.

230. See discussion *infra* Parts II.A–C.

231. *Strassheim*, 221 U.S. 280.