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VIEWPOINT

Supreme Court Ruling on the Texas Abortion Law Beginning to Unravel *Roe v Wade*

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Supplemental content

In 2021, Texas enacted an abortion statute, SB8, stating "a physician may not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child."¹ SB8's prohibition applies broadly against anyone who "knowingly engages in conduct that aids or abets the performance or inducement of an abortion."¹ The design of this law is unprecedented, enforced solely by private lawsuits, providing damages of \$10 000 or more for each abortion. SB8 prohibits government enforcement, with the explicit intent of preventing federal judicial review. SB8 clearly violates current Supreme Court precedent creating a constitutional right to abortion before fetal viability.²

SB8 Is Designed to Evade Constitutional Review

Private litigants and the Justice Department launched a series of lawsuits in federal court to enjoin the law.³ On December 10, 2021, the Supreme Court, 8-1, in a fractured set of opinions, ruled that clinicians who perform abortions, clinics, and organizations that support abortion may seek to enjoin a narrow group of government

officials from stripping a physician or facility of licensure, not against private plaintiffs threatening clinicians, abortion clinics, or others with money damages, attorneys' fees, and costs. It also suggests that Texas (or another state copying the approach taken in SB8) could close even this small loophole by specifying that licensing officials have no role in administering SB8.

All of this would have been avoided had the views of 4 justices prevailed that the Texas attorney general and court clerks were proper defendants.

What Happens Next?

The Supreme Court remanded the case to the US Court of Appeals for the Fifth Circuit. On January 17, the Fifth Circuit, at the urging of the State of Texas, referred the case to the Texas Supreme Court to decide the role of executive licensing officials under Texas law. Abortion providers asked the US Supreme Court to block the Fifth Circuit's decision, but on January 20, 2022, the Court refused to act. Justice Sotomayor, joined by Justices Breyer and Kagan, authored a blistering dissent lamenting this as "a disaster for the rule of law and a grave disservice to women in Texas, who have a right to control their own bodies." The Texas Supreme Court could effectively end legal challenges, permitting SB8 to survive.

Even if the case is returned eventually to the district court, the US Supreme Court's decision will severely limit the scope of who courts may enjoin. While the district court can try to creatively fashion a remedy, it will likely be appealed to the US Court of Appeals for the Fifth Circuit, which is highly conservative.

Clinicians and clinics can continue to challenge SB8 in the Texas court system, which may hear both state and federal law challenges. Indeed, in *Van Stean v Texas Right to Life*, a Texas state trial judge ruled that the enforcement mechanism in SB8 violated the Texas Constitution's "open courts" provision and its ban on delegations of enforcement authority. The trial court also ruled that the \$10 000 civil penalty constitutes a punishment without due process of law under the Fourteenth Amendment.⁴ The court did not, however, enjoin the law, and its decision may be overturned on appeal.

The litigation thus far has applied to preenforcement review. In a lawsuit commenced against clinicians and abortion clinics, they could argue that SB8 violates the federal constitution. That defense, however, may be substantially weakened if the Supreme Court upholds a Mississippi law banning abortion after 15 weeks of pregnancy. The Court is expected to rule in this case, *Dobbs v Jackson Women's Health Organization*, in June 2022.⁵

The Supreme Court's ruling regarding the Texas abortion law has major implications far beyond abortion.

officials and employees, but the justices ruled against Justice Department litigation.³ Pending lower court decisions, the Court let SB8 stand despite the clear fact it violates *Roe v Wade*.

What seems like a narrow victory for clinicians and abortion clinics, however, may prove ineffectual; abortion will likely remain essentially unavailable to women in Texas. The key to understanding why, is the way the 8 justices split in their reasoning. Instead of permitting a lawsuit against the Texas attorney general and court clerks, the majority permitted the case to go forward only against "executive licensing officials," who may take enforcement actions against those who violate Texas' Health and Safety Code.³

These fine distinctions matter for the future enforcement of SB8 in Texas. There remains doubt whether executive licensing officials are necessary to enforce SB8. If the Texas Supreme Court concludes that licensing officials have no enforcement authority, there would be no one to enjoin.

Even if licensing officials are found to administer SB8, any injunction may be limited to *their* licensing duties. This suggests an injunction may only prohibit offi-

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During oral arguments, most justices seemed prepared to uphold the law, either by changing *Roe*'s viability standard or even overturning the landmark case.

Given these realities, Texas abortion clinics are unlikely to resume their activities anytime soon, given concerns about the financial and reputational risks of being sued under SB8.⁶ Some clinics may close permanently because of the limited number of abortions they can perform; only a small percentage of abortions occur in the first 6 weeks of pregnancy. Abortion will remain inaccessible for women in Texas who do not have the resources to travel to other states for services, many of whom are poor, young, undocumented, or uninsured women.² The inability of some women to access safe abortion services will continue to jeopardize their health, well-being, and dignity.

The Future of *Roe v Wade*

If the Supreme Court overturns *Roe*, 18 states will immediately prohibit all abortions. These states have laws that automatically reinstate pre-*Roe* abortion bans or limit abortions to the extent the Supreme Court permits.⁷ The laws in 16 states that have established gestational limits at various points previability (ranging from 6 to 22 weeks) would also be constitutional.⁸ Even if the Court adopts a new standard to evaluate the permissibility of previability abor-

tion bans, such as an earlier gestational cutoff previability, many fetal heartbeat laws could also survive constitutional scrutiny.

Either way, the effect on abortion access will be significant. Other states will likely pass laws that prohibit previability abortions.⁷ Previability abortion bans will likely intersect with numerous additional abortion restrictions that currently exist. In 2021 alone, 19 states passed more than 100 abortion restrictions—the highest in any year since 1973⁹ (the eTable in the Supplement provides a summary of state abortion restrictions).

What Other Rights Are at Stake?

The Supreme Court's ruling regarding the Texas abortion law has major implications far beyond abortion. As Chief Justice Roberts wrote, "the clear purpose and actual effect of SB8 has been to nullify this Court's ruling" and "The role of the Supreme Court in our constitutional system is at stake."³ What Texas did to evade constitutional review of abortion restrictions other states could use to evade other constitutional rights. Indeed, the day after *Whole Women's Health v Jackson*, Governor Newsom said California would pursue a similar scheme for "ghost guns and assault weapons"—in seeking to avoid Second Amendment scrutiny.^{2,10} A deep problem with the Supreme Court's decision is that it might invite states to sidestep the Court's authority altogether.

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