

TEXAS'S 6-WEEK ABORTION BAN: S.B. 8

Texas Senate Bill 8 (“S.B. 8”) is a “vigilante” ban on abortion care after approximately six weeks of pregnancy – before many people even know they are pregnant. S.B. 8 deputizes and incentivizes private individuals to sue abortion providers and anyone helping a person obtain an abortion after six weeks of pregnancy; anyone who successfully sues another person or provider will be entitled to at least \$10,000 in damages. This ban is an attempt to force all health centers that provide abortions in the state to close by saddling them with lawsuits that consume their time and resources, and to isolate pregnant people seeking abortions in Texas from their communities and critical support networks. **The law is currently IN EFFECT.**

This law has eliminated the vast majority of abortion access in Texas, effectively making abortion care unavailable to the large number of patients who cannot overcome the logistical, financial, and discriminatory obstacles of traveling out of state to receive care. S.B. 8 constitutes a near-total ban on abortion, with no exceptions in cases of rape and incest.¹ Approximately 85-90% of people who obtain abortions in Texas are at least six weeks into pregnancy, meaning that abortion in most instances will be out of reach for patients for as long as the law is in effect. Ultimately, the law attempts to force health centers that provide abortions in the state to close. Clinics in neighboring states have already reported huge upticks in patients traveling from Texas since the law took effect – for example, an Oklahoma clinic [reported](#) that two-thirds of the phone calls they receive are now from Texas patients.

Pre-viability abortion bans have been universally blocked by federal courts when challenged, but S.B. 8 was specifically designed to be difficult to block before it took effect. By shifting enforcement from state officials to private individuals, Texas attempted to evade legal accountability and prevent the federal courts from blocking this unconstitutional ban before it took effect.

Lawmakers in many other states have [voiced their intent](#) to introduce similar bills, and copycat bills have already been introduced or pre-filed in at least eleven states, including Oklahoma, where many Texans have been traveling to seek access to abortion care.

As with other abortion restrictions, S.B. 8 disproportionately harms people of color, those with low incomes, and those in rural areas. In Texas, due to discrimination and racism, the poverty rate for Black and Latinx women is disproportionately high: the poverty rate among Black women is 19%, and is 20% for Latinx women, and 37% of female-headed households live in poverty. People struggling to make ends meet must often delay care to secure funds, and this law bans abortion funds from helping patients pay for the procedure. It is also estimated that this law could cause a [20-fold increase in driving distance](#) to access abortion care, placing yet another prohibitive hurdle to accessing care. Because of bias and discrimination in the medical system, Black women will disproportionately suffer the gravest consequences of forced pregnancy, in

¹ The law makes a single exception for “extreme medical emergency.”

light of the maternal mortality crisis in Texas and the significantly higher rates of maternal mortality and morbidity for Black women than white women in the state.²

Abortion Access in Texas

Even before S.B. 8 was allowed to go into effect, abortion was already extremely difficult to access in Texas. Patients face many hurdles in accessing abortion care, including a law that forces them to receive in-person, biased counseling, a medically unnecessary ultrasound, a 24-hour mandatory delay before obtaining an abortion that forces patients to make two trips to the clinic, a ban on telemedicine for abortion, and a parental consent requirement for minors. The state also prohibits coverage for abortion through its Medicaid program and in nearly all private insurance plans and it currently has a 22-week ban in effect. In the past decade, the state has enacted 26 abortion restrictions, including a trigger ban on abortion that would go into effect if *Roe* were overturned. These restrictions have forced health centers to close, bringing the number of abortion clinics down from [46 in 2011 to only 21 in 2017](#), and have pushed access out of reach for many. In 2017, nearly 43% of the seven million women of reproductive age in the state lived in a county without an abortion clinic and approximately [96% of counties in Texas](#) did not have an abortion clinic.

FEDERAL LITIGATION CHALLENGING S.B. 8

In July 2021, Texas abortion providers – led by Whole Woman’s Health – [filed a lawsuit](#) asking a federal district court to block the law before it was scheduled to take effect on September 1, 2021. Defendants in the lawsuit include every state court trial judge and county clerk, the Texas Medical Board, the Texas Board of Nursing, the Texas Board of Pharmacy, the Texas Attorney General, and the Director of Right to Life East Texas, who has openly called for people to sue their local abortion providers under S.B. 8.

In August, the providers filed an emergency request with the U.S. Supreme Court, asking it to block the law before it could go into effect on September 1. The Court didn’t formally rule until late at night on September 1, by which time the law had been in effect for almost twenty-four hours. In a 5-4 decision with Justice Roberts dissenting, the U.S. Supreme Court denied the emergency motion for relief filed by the Center for Reproductive Rights, Planned Parenthood Federation of America, the Lawyering Project, the ACLU, the ACLU of Texas, and Morrison & Foerster LLP.

On September 23, 2021, the providers once again asked the U.S. Supreme Court to intervene in an attempt to expedite the case. The defendants’ motions to dismiss the case had previously been denied by the district court and then appealed to the Fifth Circuit Court of Appeals, where they were pending. In filing, the plaintiffs asked the U.S. Supreme Court to hear the appeal on an expedited basis, without waiting for a further ruling from the Fifth Circuit.

DOJ Litigation

² See Kristy Johansen, *The Fight to End Texas’ High Maternal Mortality Rate*, PBS News Hour (May 25, 2019), <https://www.pbs.org/newshour/show/the-fight-to-end-texas-high-maternal-mortality-rate> (reporting that Black mothers in Texas are twice as likely as white mothers to die during childbirth).

In a separate federal [lawsuit](#) filed on September 9, 2021, the Department of Justice sued the state of Texas seeking to block the law. A preliminary injunction hearing in the DOJ's case was held on October 1, 2021 in district court, where the DOJ submitted ample evidence of the devastating impact that S.B. 8 is having on access to abortion in Texas and surrounding states. Declarations from [three Texas Planned Parenthood affiliates](#), [Planned Parenthood of the Rocky Mountains](#), and [Planned Parenthood Great Plains](#) helped tell stories that show the real and horrific impact of the ban along with declarations from independent abortion providers [Whole Woman's Health](#), [Trust Women](#), [Southwest Women's Surgery Center](#), and [Fund Texas Choice](#).

On October 6, 2021, a federal district court issued a preliminary injunction temporarily [blocking](#) S.B. 8 while the DOJ case continued. Shortly after the district court's injunction was issued, Texas filed an emergency motion to lift the injunction, and on October 8, the Fifth Circuit granted the State's motion. S.B. 8 was enjoined for just over 48 hours.

On October 18, 2021, the DOJ filed a writ of certiorari before judgment – the same procedural mechanism used by the providers in their September 23 petition asking the U.S. Supreme Court to hear their appeal without waiting for the Fifth Circuit to rule. That same day, the U.S. Supreme Court granted the providers' request to expedite consideration of their motion.

Arguments Before the U.S. Supreme Court

On October 22, 2021, the U.S. Supreme Court announced that it would hear both cases – brought by the providers and by the DOJ – but declined to rule on a request to block the ban until it heard the cases on November 1, 2021. [Dissenting](#) from the Court's decision not to block the law immediately, Justice Sonia Sotomayor wrote: "I cannot capture the totality of this harm in these pages. But as these excerpts illustrate, the State (empowered by this Court's inaction) has so thoroughly chilled the exercise of the right recognized in *Roe* as to nearly suspend it within its borders and strain access to it in other States. The State's gambit has worked. The impact is catastrophic."

Oral arguments in both cases were scheduled for November 1, 2021, presenting the following questions to the Court:

- [*United States v. Texas*](#) (the DOJ case): Whether the United States can bring suit in federal court and obtain injunctive or declaratory relief against the State, state court judges, state court clerks, other state officials, and all private parties to prohibit S.B. 8 from being enforced?
- [*Whole Woman's Health v. Jackson*](#) (the abortion providers' case): Whether a state can insulate from federal court review a law that prohibits the exercise of a constitutional right by delegating to the general public the authority to enforce that prohibition through private lawsuits?

On December 10, 2021, the Supreme Court issued decisions in both cases, allowing the law to stay in effect for the foreseeable future:

- [*United States v. Texas*](#): The Court declined to rule on the DOJ's challenge to S.B. 8., holding that certiorari had been improvidently granted. Instead, the Court returned the

case back to the Fifth Circuit Court of Appeals, which had already lifted emergency relief blocking the law.

- *Whole Woman's Health v. Jackson*: The Court green-lit S.B. 8's vigilante scheme and copycat laws proceeding in other states by holding that the providers cannot obtain an injunction blocking state court judges, the state court clerks, the Texas Attorney General, and the private individual named in the suit from filing S.B. 8 cases. The Court found that the providers' challenge could proceed against the state licensing officials – however, as a practical matter, any potential relief against these defendants could **not** prevent ruinous lawsuits from being filed under S.B. 8.

Dissenting Justices mourned the impact that the Court's decision will have on the Constitution itself.

- Chief Justice Roberts wrote, "The nature of the federal right infringed does not matter; it is the role of the Supreme Court in our constitutional system that is at stake."
- In a separate dissent, Justice Sotomayor wrote, "By foreclosing suit against state-court officials and the Texas Attorney General, the Court effectively invites other states to refine S.B. 8's model for nullifying federal rights. The Court thus betrays not only the citizens of Texas, but also our constitutional system of government."

Following this decision, the U.S. Supreme Court remanded the providers' challenge to the Fifth Circuit. On December 16, 2021, Texas asked the Fifth Circuit to certify a question to the Texas Supreme Court: specifically, whether the state licensing officials could actually enforce S.B. 8 under state law. This request was granted on January 17, 2022, following additional oral arguments before the Fifth Circuit, which once again slowed down litigation and prevented the providers from obtaining any relief in federal court.

Providers again filed petitions with the U.S. Supreme Court, seeking an order remanding the case to the district court – however, the Court again denied the request.

Arguments were held before the Texas Supreme Court on February 24, 2022, and on March 11, 2022, the Texas Supreme Court unanimously held that state licensing officials do not have the authority to enforce S.B. 8, meaning that the narrow path for continued litigation left open by the U.S. Supreme Court is now closed. **This decision means that the case will ultimately be thrown out and that providers in Texas are left with no other options in federal court.** S.B. 8 will continue to remain in effect for the foreseeable future.

SUGGESTED MESSAGING

- This law is a full-scale assault on patients, their health care providers, and their support systems. It creates an incentive for private individuals to sue anyone who helped a patient get the care they need, including a clergy member or counselor who advised the patient, abortion funds that assisted the patient with paying for their health care, and even

someone who drives the patient to their appointment including family members, friends, and rideshare drivers.

- This ban isolates people seeking abortion by targeting their entire support network and discouraging their loved ones from helping them for fear of being sued. It is the most extreme and harshest abortion ban in the country.
- Texas's six-week abortion ban is designed to intimidate physicians and other health care center staff out of providing abortion care. By continuing to provide abortion care, providers could face ruinous financial penalties, legal costs, and court orders shutting their doors. It allows anyone who disapproves of an abortion — a neighbor, distant relative, an abusive partner, or even a stranger — to obtain a court order stopping an abortion and ordering the health center to shut down.
- Pregnant people have the right to make their own health care decisions without interference from politicians. Every person should be able to make their own decisions about their health and their bodies — including about abortion. No one should have their most personal medical decisions controlled by politicians, neighbors, complete strangers, or anyone else.

S.B. 8 LITIGATION TIMELINE

- On May 19, 2021, the Governor of Texas, Greg Abbott, [signed](#) S.B. 8 into law.
- On July 13, 2021, Texas abortion providers [filed](#) a lawsuit to block the bill before it could go into effect.
- On August 25, 2021, the federal district court [denied](#) motions filed by various defendants to dismiss the lawsuit against them. Defendants immediately filed a notice of appeal with the Fifth Circuit, as well as a motion to stop all proceedings in the district court, including canceling the district court's preliminary injunction hearing.
- On August 27, 2021, the Fifth Circuit Court of Appeals issued [an order](#) stopping all proceedings in the district court, including canceling the district court's preliminary injunction hearing. The court also denied the plaintiffs' request to expedite the appeal of the defendants' motion to dismiss. Without expediting the appeal process, the law could have been in effect for months before the Fifth Circuit issued a decision.
- August 29, 2021: The plaintiffs filed for emergency relief with the Fifth Circuit, which was quickly [denied](#).
- August 30, 2021: The plaintiffs filed [an emergency request](#) with the U.S. Supreme Court, asking it to block the law before it could take effect on September 1 or allow district court proceedings to resume.
- On September 1, 2021, without action from the U.S. Supreme Court, S.B. 8 went into effect.
- Late on September 1, the U.S. Supreme Court denied the emergency motion for relief. The ruling allowed the law to remain in effect, and the case proceeded before the Fifth Circuit
- On September 10, 2021, the Fifth Circuit issued an order explaining its refusal to block the law and expedited the defendants' appeals to "the next available oral argument panel."

- On September 22, 2021, the Fifth Circuit issued a briefing schedule that would not allow the case to be heard until at least December.
- On September 23, 2021, plaintiffs filed a petition for writ of certiorari before judgment with the U.S. Supreme Court, asking it to hear the defendants' appeal on an expedited basis.
- October 6, 2021: In a separate case filed by the DOJ, a federal district court judge temporarily blocked the law. The state appealed this decision to the Fifth Circuit.
- October 8, 2021: The Fifth Circuit stayed the district court's injunction in the DOJ case, allowing the law to take effect once more. On October 18, the DOJ asked the U.S. Supreme Court to lift the Fifth Circuit's stay and to also hear defendants' appeal on an expedited basis, bypassing further proceedings in the Fifth Circuit.
- October 22, 2021: The U.S. Supreme Court agreed to hear the DOJ's case and *Whole Woman's Health v. Jackson* (the providers' case) on November 1, 2021 but did not grant the DOJ's request to immediately block the law.
- October 27, 2021: Five Planned Parenthood affiliates in Texas and neighboring states filed [an amicus brief](#) in the DOJ case, detailing additional stories of patients and providers since S.B. 8 went into effect.
- November 1, 2021: Oral arguments in both cases were heard before the U.S. Supreme Court.
- December 10, 2021: The U.S. Supreme Court [issued its ruling](#) in *Whole Woman's Health v. Jackson* refusing to block the law. In a 5-4 decision, the Court dismissed the most significant part of the case, ruling that the providers could not bring suit against the classes of state judges and clerks or the Texas Attorney General. While the Court allowed a narrow portion of the case to proceed in federal court against the state licensing officials, an injunction against those officials would not block Texas's vigilante scheme. The Court declined to rule on the DOJ's challenge to S.B. 8, holding that certiorari had been improvidently granted.
- January 3, 2022: Providers filed a [Writ of Mandamus](#) petition at the U.S. Supreme Court asking the case to be sent back to the district court.
- January 7, 2022: Oral arguments were held at the Fifth Circuit regarding where to send the case next.
- January 17, 2022: The Fifth Circuit issued a ruling sending the case to the Texas Supreme Court.
- January 20, 2022: The U.S. Supreme Court rejected the providers' Writ of Mandamus petition.
- February 24, 2022: Oral arguments were held at the Texas Supreme Court.
- March 11, 2022: The Texas Supreme Court ruled that litigation cannot proceed against the Texas Medical Board and other similar state licensing officials, the only remaining

defendants in *Whole Woman's Health v. Jackson*. This will result in dismissal of this challenge to the 6-week ban, meaning S.B. 8 will likely remain in effect for the foreseeable future.