



TEXAS ABORTION RESTRICTIONS


U.S. Supreme Court lets enforcement of Texas abortion law continue but allows legal challenges to proceed

The court allowed the suit to continue on an 8-1 decision. Abortion providers will resume seeking to block the law as it progresses through lower court proceedings.

BY **REESE OXNER** DEC. 10, 2021 UPDATED: 1 PM CENTRAL

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Abortion opponents and abortion rights activists protest outside the Supreme Court building ahead of arguments in the Mississippi abortion rights case *Dobbs v. Jackson Women's Health Organization*, in Washington, D.C., on Dec. 1, 2021.  REUTERS/Evelyn Hockstein

The U.S. Supreme Court on Friday ruled that the legal challenge brought forward by abortion providers against Texas' abortion restriction law may continue, bringing new life into the fight against the statute but also drawing the ire of abortion providers who criticized the ruling for not blocking the law outright.

The court allowed the suit to continue on an 8-1 decision but did not stop the law's enforcement. Instead, the suit will continue in a lower federal court, where abortion providers will resume seeking to block the law, commonly referred to as Senate Bill 8. Justice Clarence Thomas was the lone dissenting vote.

And while the legal challenge against the Texas law was allowed to proceed, abortion rights remain in peril on more than one front as the Supreme Court considers a case from Mississippi that could put an end to constitutional protections on abortions. The high court is set to rule on that case next summer.

Justice Sonia Sotomayor agreed with allowing the suit to continue but condemned the high court's decision to leave the law in effect, saying it has had "catastrophic consequences for women seeking to exercise their constitutional right to an abortion in Texas."

"The Court should have put an end to this madness months ago, before S. B. 8 first went into effect," she wrote. "It failed to do so then, and it fails again today."

The justices also allowed the abortion providers to sue some state licensing officials, but not state court clerks or judges, citing difficulties surrounding sovereign immunity. Chief Justice John Roberts, a conservative-leaning justice, and all three liberal justices argued that other state officials could be sued — but lost to the majority vote.

The defendants removed from the suit were a key party whom providers were seeking to block from enforcing the abortion law. Enforcement was temporarily blocked for two days in October when a U.S. district judge prevented court clerks and judges from taking cases under the law, the strongest judicial reprimand to the statute so far.

Now that those defendants are off the table, it's unclear what path remains for abortion rights advocates to topple the law.

"By blessing significant portions of the law's effort to evade review, the Court comes far short of meeting the moment," Sotomayor said. "By foreclosing suit against state court officials and the state attorney general, the Court clears the way for States to reprise and perfect Texas' scheme in the future to target the exercise of any right recognized by this Court with which they disagree. This is no hypothetical. New permutations of S. B. 8 are coming."

In a separate decision, the court dismissed a challenge from the Biden administration.

Abortion rights in jeopardy

Providers and national abortion-rights activists initially saw the decision to let the legal challenge move forward as a hopeful sign, but they bashed the court's order as the details sank in, calling it an opening for other states to enact laws that violate constitutional rights by allowing them to be enforced by citizen lawsuits.

"This is a dark day for abortion patients and for physicians and providers," said Marc Hearn, senior council for the Center for Reproductive Rights. "It is also a dark day for anyone who cares about constitutional rights."

Since the law went into effect, Texas abortion clinics have reported a sharp decline in procedures and some have gone as far as stopping them altogether in fear of litigation. The number of abortions in Texas plummeted by half, according to a study from the University of Texas at Austin.

The decline has put a strain on Texas clinics, which have faced a barrage of restrictions leading to closures over the years. Amy Hagstrom Miller, president of Whole Woman's Health, which operates four clinics in Texas and is the lead plaintiff in the providers' lawsuit, said that unless the law is blocked soon, the future of her clinics "looks bleak."

"Staying open is not sustainable if this ban stays in effect much longer," Hagstrom Miller said.

John Seago, legislative director with Texas Right to Life, called Friday's ruling a "partial victory" for abortion opponents.

"We are encouraged that the court has practiced judicial restraint for the past 100 days, as well as today, when they did not enjoin the law," Seago said. "While this life-saving law continues in Texas, we will see unborn children and women continue to be protected in Texas."

Katherine Franke, a professor of law at Columbia University and director of the university's Center of Gender and Sexuality Law, said she was pleased that the Supreme Court allowed the provider's lawsuit to continue — but the court continues to make concessions over a person's right to an abortion.

"What the [Supreme Court] has done is reiterate what their earlier ruling was, which is that a majority does not see a constitutional emergency in this case, even though SB 8 clearly and intentionally violates established Supreme Court law," she said.

Franke said allowing the law to stay in effect while court proceedings continue proves that abortion rights are in jeopardy more than something like religious freedom. Although Friday's decision allows the fight against Texas' law to continue, she said more should have been done to protect abortion rights.

"The decision could have been much worse than it was ... but this decision takes place within a larger legal landscape where the underlying right that's at stake — that the court has not even addressed yet — could very well be eliminated and overruled," she said. "It's not a complete loss. I wouldn't say it's a partial victory, but it's not a complete loss."

Legal fights continue

The Supreme Court handed down the decision in the Texas case five weeks after justices heard oral arguments over the law on Nov. 1. Abortions after about six weeks of pregnancy have been virtually banned in Texas for over 100 days since the law went into effect on Sept. 1.

The high court's decision Friday was not on the law's overall constitutionality, but rather on the procedural woes that plagued legal efforts to challenge it. During the arguments, six out of nine Supreme Court justices expressed concerns

specifically over the way Texas enforces the law — and the way it could be used to limit other constitutional rights.

“There’s a loophole that’s been exploited here,” Justice Brett Kavanaugh said during the Nov. 1 hearing. “It could be free speech rights. It could be free exercise of religion rights. It could be Second Amendment rights — if this position is accepted here.”

Texas’ law, which bars abortions before many know they’re pregnant, had been successful in blocking procedures in the state by using the unique tactic. Its enforcement mechanism has allowed the law to buck judicial review by making it difficult to sue the law’s enforcers, which is the traditional route to stop a law from going into effect.

Courts, to block laws, typically order state officials to not enforce them. But that’s impossible under Texas’ abortion law, which made private citizens the de facto enforcers of the law by empowering them to sue those who “aid or abet” abortions past around six weeks of gestation — and promises them \$10,000 if they win their lawsuit.

Melissa Murray, a professor at the New York University School of Law, said the Supreme Court’s decision Friday was likely made more on the idea that “everyone should be concerned about the implications of this kind of enforcement mechanism on the rule of law more generally — not just specifically on abortion.”

The abortion providers’ suit, plus a separate one filed by the U.S. Department of Justice, had brought Texas’ abortion law back before the high court months after the justices had declined to grant an emergency relief request seeking to stay the law while it was challenged in court.

The providers’ suit now returns to U.S. District Judge Robert Pitman, who previously blocked enforcement of the law for two days. It was resumed by the 5th Circuit Court of Appeals, which is known as perhaps the nation’s most conservative appellate court.

The suit could follow a similar trajectory as before: If Pitman blocks the law again, abortion opponents will likely appeal to the 5th Circuit as well — and then, the case could land before the Supreme Court once more.

The ruling comes a day after a state district judge agreed with 14 abortion advocates and declared that the Texas law violates the state's Constitution, though he didn't stop it from being enforced. That ruling would likely be used as precedent in individual lawsuits filed under the statute.

Earlier this month, the Supreme Court heard oral arguments in *Dobbs v. Jackson Women's Health Organization*, a lawsuit that came after Mississippi passed a law banning most abortions after 15 weeks of pregnancy. While the Texas case before the high court focused on the validity of the unique enforcement mechanism used by the state's abortion law, the Mississippi case puts constitutional protections for abortion access into question — and many court observers believe the justices are poised to roll back those protections.

The Supreme Court currently has a conservative supermajority, with six out of nine justices appointed by Republican presidents. Those conservative members have historically shared anti-abortion positions and, during oral arguments for the Mississippi case, they seemed open to at least partly overturn *Roe v. Wade*, the 1973 landmark case that helped establish constitutional protections for abortions.

If that happens, it would mean the end of legal abortions in Texas. That's because the Texas Legislature passed a "trigger" law this year that would automatically come into effect if *Roe* is "wholly or partly" overturned. It would also render much of the fight over the Texas abortion law moot.

The Supreme Court on Friday also ruled on the case brought forward by the U.S. Justice Department against the Texas law. In that case, the high court found that the DOJ does not have standing to sue Texas over its abortion law, commonly referred to as Senate Bill 8. The court effectively ended the lawsuit and the Biden administration's role in the judicial battle over the controversial law, saying it was "improvidently granted."

"The Department of Justice brought suit against Texas Senate Bill 8 because the law was specifically designed to deprive Americans of their constitutional rights while evading judicial review," a DOJ statement read. "The department will continue our efforts in the lower courts to protect the rights of women and uphold the Constitution."

Eleanor Klibanoff and Karen Brooks Harper contributed to this report.

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