



# Beyond Roe:

## Gestational Age Bans

**KEEP  
ABORTION  
LEGAL**

Gestational age bans prohibit abortion after a specific point in the pregnancy. These laws attempt to ban abortion before viability — the medical point when a fetus has the capacity to survive outside the uterus. The U.S. Supreme Court's 1973 decision in *Roe v. Wade* and additional abortion rulings since then prohibit pre-viability bans, making these types of gestational age limits unconstitutional.<sup>1,2</sup> And yet, efforts to ban abortion by gestational age continue as a favored tactic of anti-abortion lawmakers as they seek to overturn *Roe*.

### TEXAS SENATE BILL 8

Recently, anti-abortion lawmakers in Texas passed Senate Bill 8 (SB 8), a law that bans abortion at six weeks with no exceptions for rape or incest. The law creates a bounty system in which citizens enforce the law by suing anyone who “aids and abets” someone in Texas seeking an abortion. If they are successful in their lawsuit, citizens could collect a reward of \$10,000.

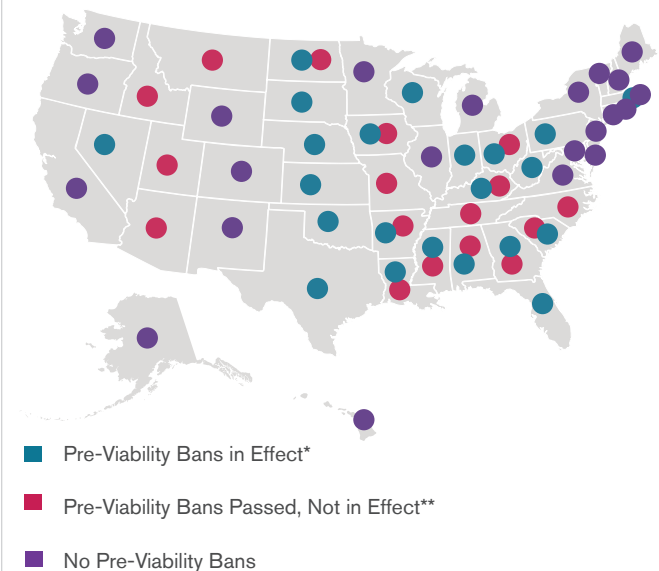
into effect while litigation proceeds, except for Texas' SB 8. Still, the passage of these bans has confused residents about the legal status of abortion in their state.

### Gestational Age Bans by States

While federal and state courts consistently block laws banning abortion before 13 weeks since the start of a person's last menstrual period (LMP), more than one third of states have been able to successfully implement abortion bans at 22 weeks LMP — undermining the right established by *Roe* in those states.<sup>3</sup> These gestational age bans were passed by state legislators based on the assertion that the fetus can feel pain at 20-22 weeks LMP.<sup>4</sup> The American College of Obstetricians and Gynecologists refutes that claim, stating a fetus does not have the physiological capacity to perceive pain until at least 24 weeks LMP.<sup>5</sup>

Furthermore, 16 states have passed extreme abortion bans, ranging from 18-week-LMP bans in Arkansas and Utah to a total ban on abortion, at any point in pregnancy, in Alabama.<sup>6</sup> The lower federal courts have blocked these laws from going

#### Types of Gestational Age Bans by State<sup>7</sup>



\*There are some states with both pre-viability bans (banning abortion up to 24 weeks LMP) that are in effect and pre-viability bans that have been passed but are not in effect. These states already have one gestational age ban implemented and also have an even earlier gestational age ban on the books that was passed but is not currently in effect due to court order.

\*\*These bans are passed, but not currently in effect due to permanent or temporary court order.

## SIX-WEEK BANS

Some of the most extreme abortion bans in the U.S. come in the form of six-week bans, often misleadingly referred to as “heartbeat” bans. Anti-abortion legislation has defined this point where technology can first detect electrical activity, or a flutter, as a “fetal heartbeat”;<sup>8</sup> however, experts say that at this point, the embryo is not yet a fetus and the heart has not yet been formed.<sup>9,10</sup> Six-week gestational bans have been passed in nine states across the country, but as of publication, Texas’ ban is the only one to have gone into effect. Policymakers in other states considered hostile to abortion rights are now seeking to replicate the Texas law to ban abortion at just six weeks of pregnancy.<sup>11</sup> It is burdensome and challenging for most pregnant people to identify that they are pregnant, decide on what to do with the pregnancy, and arrange for safe abortion care all before a six-week deadline. Six-week bans are unconstitutional and can cause serious harm to pregnant people’s health and well-being.

**“Arbitrary gestational age bans on abortion at six weeks that use the term ‘heartbeat’ to define the gestational development being targeted do not reflect medical accuracy or clinical understanding. Pregnancy and fetal development are a continuum. What is interpreted as a heartbeat in these bills is actually electrically induced flickering of a portion of the fetal tissue that will become the heart as the embryo develops.”**

— Dr. Ted Anderson, former President of American College of Obstetricians and Gynecologists<sup>12</sup>

**Gestational age bans alone are harmful; but when working in tandem with other restrictive policies, the barriers to accessing abortion can become insurmountable and deepen existing inequalities — even under *Roe*.**

## The Gestational Age Ban Before the Supreme Court

Following a ruling from the Supreme Court that allowed Texas SB 8 to go into effect, gestational age bans will take center stage once again later in 2021, when the Supreme Court plans to hear arguments for *Dobbs v. Jackson Women’s Health Organization*, a case that threatens to further upend the abortion rights protected under *Roe*. The case centers around a Mississippi law banning abortion after 15 weeks of pregnancy.<sup>13</sup> The question at hand is whether all pre-viability bans on elective abortions are unconstitutional. The justices’ decision has the potential overturn *Roe* and worsen the already deteriorated landscape of abortion rights in the U.S.

## A Legislative Solution

In the past, the lower federal courts have stepped in to block most of these bans from going into effect. However, with over 200 Trump-appointed judges in the lower federal courts, many reproductive health advocates do not feel confident in the lower federal courts blocking new anti-abortion legislation.<sup>14</sup> More so, with a new conservative majority on the Supreme Court and worrisome anti-abortion success in Texas, there is heightened cause for concern. To stop these bans for good, Congress must pass the *Women’s Health Protection Act* (WHPA). WHPA is a piece of federal legislation that would ensure that the right to access abortion care is actually a reality for all people in the U.S., free from medically unnecessary restrictions and bans, like gestational age bans. WHPA would create a statutory right for health care providers to provide abortion care and a corresponding right for patients to receive abortion care.<sup>15</sup> Most importantly, should the Supreme Court overturn *Roe*, WHPA would protect abortion rights in its place. Should the Supreme Court not overturn *Roe*, it is still crucial that Congress passes WHPA in order to ensure abortion rights are protected from the numerous forms of anti-abortion legislation at the state-level.<sup>16</sup>

## Endnotes

- 1 *Roe v. Wade* (Supreme Court of the United States January 22, 1973).
- 2 *Planned Parenthood of Southeastern Pennsylvania v. Casey* (Supreme Court of the United States June 29, 1992).
- 3 Guttmacher Institute. (2021, July). *State Bans on Abortion Throughout Pregnancy*. <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions>
- 4 Kaiser Family Foundation. (2021, September 16). *States with gestational limits for abortion*. <https://www.kff.org/womens-health-policy/state-indicator/gestational-limit-abortions/?currentTimeframe=0&sortModel=%7B%22colId%22%3A%22Location%22%2C%22sort%22%3A%22asc%22%7D#note-16>.
- 5 American College of Obstetricians and Gynecologists. (n.d.). *Fetal pain*. <https://www.acog.org/advocacy/facts-are-important/fetal-pain>.
- 6 Guttmacher Institute. (2021, July). *State Bans on Abortion Throughout Pregnancy*. <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions>
- 7 Guttmacher Institute. (2021, July). *State Bans on Abortion Throughout Pregnancy*. <https://www.guttmacher.org/state-policy/explore/state-policies-later-abortions>
- 8 Hughes, B. (2021, March 11). *Bill: SB 8*. Texas legislature online - 87(R) History for SB 8. <https://capitol.texas.gov/BillLookup/History.aspx?LegSess=87R&Bill=SB8>.
- 9 Artal-Mittelmark, R. (2021, October 25). *Stages of development of the fetus - women's health issues*. Merck Manuals Consumer Version. Retrieved from <https://www.merckmanuals.com/home/women-s-health-issues/normal-pregnancy/stages-of-development-of-the-fetus#v809193>.
- 10 Glenza, J. (2019, June 5). Doctors' organization: calling abortion bans "fetal heartbeat bills" is misleading. *The Guardian*. <https://www.theguardian.com/world/2019/jun/05/abortion-doctors-fetal-heartbeat-bills-language-misleading>
- 11 Barnaby, W. (2021, September 22). *Bill: HB 167*. [https://myfloridahouse.gov/Sections/Documents/loadoc.aspx?FileName=\\_h0167\\_.docx&DocumentType=Bill&Bill-Number=0167&Session=2022](https://myfloridahouse.gov/Sections/Documents/loadoc.aspx?FileName=_h0167_.docx&DocumentType=Bill&Bill-Number=0167&Session=2022).
- 12 Glenza, J. (2019, June 5). Doctors' organization: calling abortion bans "fetal heartbeat bills" is misleading. *The Guardian*. <https://www.theguardian.com/world/2019/jun/05/abortion-doctors-fetal-heartbeat-bills-language-misleading>
- 13 *Dobbs v. Jackson Women's Health Organization* (Supreme Court of the United States May 17, 2021).
- 14 Population Institute. (2020, October). *Reshaping of the lower federal courts: What is at stake for reproductive health and rights?* <https://www.populationinstitute.org/wp-content/uploads/2020/10/Population-Institute-Reshaping-of-the-Lower-Federal-Courts.pdf>
- 15 Act for Women. (2021, June 9). *The Women's Health Protection Act*. <https://actforwomen.org/the-womens-health-protection-act/>
- 16 *ibid*

