



# Beyond Roe: SB 8



Texas' Senate Bill 8 (SB 8) is one of the nation's most restrictive abortion laws. It bans abortion as early as six weeks into pregnancy, two weeks after a missed period, with no exceptions in cases of rape or incest. This law, currently in effect, is unconstitutional and is designed to be immune to judicial review. Furthermore, SB 8 is being used as a template for lawmakers in other states to implement similar bans.

## SB 8 EXPLAINED

On September 1, 2021, SB 8 became law in the state of Texas. While abortion is still technically legal in the Lone Star State, the new law bans abortion upon the detection of cardiac activity in embryos, which usually occurs around six weeks of gestation.<sup>1</sup> This means it is only legal for about a two-week timeframe after a person's first missed period — two weeks before most doctors suggest scheduling an initial prenatal visit.<sup>2</sup> This has devastating consequences for individuals seeking abortion services as abortion providers in Texas estimated 85 to 90 percent of abortion seekers in Texas are at least six weeks into pregnancy.<sup>3</sup>

SB 8 has a unique enforcement mechanism compared to other proposed six-week abortion bans that have been previously blocked by lower federal courts. The new state law incentivizes private citizens — whether family, neighbors, or even complete strangers — to enforce the ban and collect a reward for doing so. The law does not authorize lawsuits against people who get abortions, but rather empowers anyone — even someone unconnected to the person having the abortion — to sue anyone who “aids and abets” an individual seeking an abortion after six weeks of gestation. That could possibly be a family member who helps pay for an abortion, a ride-share driver who transports a person to their appointment, or a receptionist who provides information at a clinic. If their court challenge is successful, a citizen could be awarded \$10,000 plus attorney fees.<sup>4</sup>

## IMMUNE TO JUDICIAL REVIEW?

SB 8 was drafted by its authors to be immune from the types of legal challenges that lead to similar laws being struck down as unconstitutional. Unlike other gestational age bans that place the onus on the state to enforce the law, SB 8 prohibits state officials from enforcing its terms through criminal prosecution and instead delegates enforcement to private citizens through civil lawsuits. This creates legal obstacles in efforts to challenge the law's constitutionality. In other previability gestational ban cases, a judge has addressed an injunction — an order from the court that the law must be halted — toward the state authorities designated with enforcing the law.<sup>5</sup> But as SB 8 was written, Texas officials are not tasked with overseeing compliance with the six-week abortion ban. Attorney General for the State of Texas, Ken Paxton, argued in court filings that the state cannot be subject to a lawsuit over whether the law is constitutional as SB 8 is enforced by private citizens, and not state government officials.<sup>6</sup> By crafting SB 8 this way, it frustrated judicial review before the law took effect, as a person must be sued by a civilian before the courts could be involved. Because the Supreme Court did not intervene to prevent the law from going into effect, other states may seek to enact similarly designed bans that cannot be challenged until after the law takes effect. The Biden administration asked the Supreme Court to temporarily block the enforcement of the Texas law as the legal disputes play out in court. Additionally, abortion providers also asked the Supreme Court to block implementation of the law and provided arguments alongside the U.S. government on November 1, 2021.



Given the severe financial and legal consequences, SB 8 has created a chilling effect that could prevent physicians from providing information on all pregnancy options to patients out of fear of being sued.<sup>7,8</sup> This chilling effect could also extend beyond the medical community to those who might have otherwise helped someone seeking an abortion. These individuals may now be far less likely to do so for fear of having to defend themselves against the lawsuits that SB 8 encourages.

### THE SUPREME COURT'S SHADOW DOCKET

A “shadow docket” refers to a “range of orders and summary decisions that defy [the Supreme Court’s] normal procedural regularity.”<sup>9</sup> It contains emergency motions and other expedited cases that do not receive oral argument or full briefing. In the case of SB 8, a group of litigants, including the American Civil Liberties Union, Planned Parenthood, and the Center for Reproductive Rights, among others, filed an emergency motion, asking the Supreme Court to block SB 8. The Supreme Court took no action, allowing SB 8 to take effect on the 1<sup>st</sup> of September. Twenty-four hours later, the Supreme Court handed down an order that said they would not grant an injunction – allowing the law to remain in effect.<sup>10</sup>

**“Presented with an application to enjoin a flagrantly unconstitutional law engineered to prohibit women from exercising their constitutional rights and evade judicial scrutiny, a majority of Justices have opted to bury their heads in the sand.”<sup>11</sup>**

— Justice Sonia Sotomayor, Dissenting

### Landscape of Abortion Access in Texas

The people of Texas have very limited options when it comes to accessing abortion care. Texas earned an “F minus” grade in the Population Institute’s 2020 *State of Reproductive Health and Rights: A 50-State Report Card*. That’s because SB 8 is preceded by other bans and restrictions that, working in tandem, make accessing abortion nearly impossible within the borders of the state. These other bans include:

- Mandatory counseling and 24-hour waiting period between counseling session and abortion;
- Mandatory ultrasound requirement at least 24 hours before obtaining an abortion;

- Private and public insurance policies can only cover abortion in cases of life endangerment or if the person’s health is severely compromised;
- The parent of a minor must consent and be notified before an abortion is provided;
- Unnecessary and burdensome standards for abortion clinics related to their physical space, equipment, and staffing.<sup>12</sup>

Given this context, the addition of SB 8 makes obtaining an abortion in a two-week timeframe after the first missed period nearly impossible.

### 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>13</sup> however, experts say that at this point, the embryo is not yet a fetus and the heart has not yet been formed.<sup>14,15</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>16</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 within a six-week deadline. Six-week bans are unnecessary, unconstitutional, and can cause serious harm to pregnant people’s health and well-being.

### A Disproportionate Harm

The impacts of SB 8 are disproportionately felt by Black, Indigenous, and people of color (BIPOC), low-income individuals, and those living in the rural areas of Texas. Prior to SB 8, 74 percent of people obtaining abortions were BIPOC, 61 percent had at least one child, and 44 percent had family incomes below 200 percent of federal poverty guidelines.<sup>17</sup> This suggests that many seeking abortion care are people of color taking care of the children they already have with limited resources. SB 8 stands to further intensify racial, social, and health disparities in the state. This is particularly true when it comes to maternal health. SB 8 will force people unable to travel for abortion services after six weeks of pregnancy to carry to term. This is worrisome as Texas has a high maternal mortality rate. In 2018, the overall maternal mortality was 18.5 maternal deaths per 100,000 live births, higher than the national average of 17.4 maternal deaths per 100,000 live births for the same year.<sup>18,19</sup> Black women are disproportionately affected, accounting for 11 percent of live births but 31 percent of maternal deaths in the state.<sup>20\*</sup>

\*Population Institute (PI) is intentionally using women in statements where the data do not include the nonbinary people or trans men in the research. Otherwise, PI uses gender-inclusive language to include all individuals who may seek abortion services.

Low-income individuals who already face barriers to accessing health care are also harmed by this law. Since Texas has not expanded its Medicaid eligibility rules, low-income people are further predisposed to inequalities in health care coverage and preventative care including contraception. Furthermore, SB 8 will force people to travel out of state to access abortion care, requiring additional expenses related to transportation, housing, childcare, and lost wages.<sup>21</sup> For some, the driving distance to reach the closest abortion clinic outside of Texas is now almost 250 miles one way.<sup>22</sup> This can be incredibly expensive and therefore, an unrealistic option for many.

## SB 8 as a Blueprint

When SB 8 took effect after the Supreme Court refused to grant a group of litigants' emergency request to block it, it signaled to other anti-abortion lawmakers a path forward. In late September, a member of the Florida House of Representatives introduced legislation that copies SB 8.<sup>23</sup> Similarly, Ohio used SB 8 as a template to introduce an even more restrictive piece of legislation in November that would ban all abortions in the state.<sup>24</sup> Other state lawmakers, such as those in Arkansas, Mississippi, North Dakota, and South Dakota, are said to be looking into using SB 8 as a blueprint for adopting similar bans in their states.<sup>25</sup>

## Status of SB 8

SB 8 is still in effect, meaning that *Roe* is no longer the law of the land in Texas. Texas is home to almost seven million women of reproductive age, out of a total of 75 million in the entire country, which means that *Roe* is now effectively meaningless for one out of 10 women of reproductive age in the U.S.<sup>26</sup> The Biden administration filed a lawsuit against Texas as well as requested a federal judge in Texas temporarily block the enforcement of the state's new law.<sup>27</sup> U.S. District Judge Robert L. Pittman granted the injunction, allowing abortions after six weeks to continue. However, that temporary injunction only lasted two days when the U.S. Court of Appeals for the 5<sup>th</sup> Circuit granted a request filed by the Texas attorney general to suspend Judge Pittman's order, reinstating the ban.<sup>28</sup> The Biden administration has now asked the Supreme Court to block SB 8 while the litigation over the law's constitutionality goes forward.<sup>29</sup> The high court responded by agreeing to hear both challenges — one brought by providers, another brought by the Biden administration — on November 1, 2021; however, the Supreme Court would not block the ban in the meantime.<sup>30</sup> While this law is still in effect, people six or more weeks pregnant in Texas and seeking abortion services are left with very few options.

**SB 8 alone is 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*.**

## Endnotes

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