

11-10-2021

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Texas Heartbeat Act Poses Threat to the Future of Abortion Access

As the abortion debate in the United States has grown increasingly tense over the recent years, a newly enacted Texas law could lay the groundwork for a national trend of restrictive abortion laws. [SB 8](#), also known as the Texas Heartbeat Act, was first signed by Texas Governor Greg Abbott in May 2021, and [came into effect on September 1st](#). The Texas Heartbeat Act is not the only recent bill that attempts to challenge *Roe v. Wade*. In 2018, Mississippi passed the [Gestational Age Act](#), which bans abortions after 15 weeks of pregnancy. The Texas Heartbeat Act is even more restrictive, banning abortion after just six weeks of pregnancy. While national opinion on the abortion debate continues to be divisive—a [nearly 50/50 split](#) between pro-life and pro-choice over the last 20 years—this newest development, if upheld, could substantially impact abortion access.

Incentivizing Civil Actions

The [Texas Heartbeat Act](#) prohibits physicians from performing abortions after detecting a fetal heartbeat. Additionally, it penalizes physicians who perform abortions without testing for a fetal heartbeat first. As the first of its kind, this law now allows any private individual to make a civil claim not only against anyone who performs an abortion under such circumstances, but also against anyone who “knowingly engages in conduct that aids or abets the performance or inducement of an abortion.” The statutory language gives examples of what would fall under this category, including anyone who pays for or reimburses the cost of an abortion.



[Julia](#)

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In the civil claim, if the plaintiff prevails, the plaintiff is entitled to statutory damages of not less than \$10,000. The law also [protects plaintiffs](#) from having to pay the legal fees if the case is dismissed. These provisions are likely meant to incentivize people to take legal action against anyone whom they suspect is performing or participating in unlawful abortions, from physicians to friends or family members who help the patient access the procedure. President Biden criticized this aspect of the law, claiming that it creates a “[vigilante system](#)” by placing the burden of enforcement on citizens instead of government officials.

Procedural and Substantive Concerns

This enforcement mechanism has the additional impact of making it easier for the law to [evade judicial review](#). Because the burden of enforcement falls on the general public, rather than state officials, [there have been concerns](#) about the efficacy of redress from the court, as it would be difficult to identify a specific defendant for the court to make an injunction against. If state officials were in charge of enforcing the law, however, this would not be of concern because the court could issue an injunction against the state from enforcing the law. With the current enforcement mechanism, there are additional concerns over whether there is *anyone* who can be sued to challenge the law. Without a way to bring any defendant into court, the law is designed to guarantee that it will go unchallenged. In its recent [amicus curiae](#), the Firearms Policy Coalition argued that if this law stands, it will usher in countless other laws that copy Texas’ model of evading judicial review to infringe on other constitutional rights. Moreover, the law has been met with substantive criticisms due to its conflict with the Supreme Court’s decision in *Roe v. Wade*. *Roe v. Wade* created the [viability rule](#), which protects the right to an abortion before the fetus is considered viable. Attorney General Merrick Garland claims the Texas Heartbeat Act is “[invalid under the Supremacy Clause](#)” and “is preempted by federal law.” While fetuses are

generally not considered viable until the [third trimester](#), this law restricts abortion well before that point, directly challenging the authority of *Roe v. Wade*.

Further Challenges to Reproductive Justice

The Texas Heartbeat Act has been met with [broad criticism](#) from abortion activists that claim the law [functionally bans abortion](#) in Texas. Planned Parenthood noted that the law prohibits abortion “[just two weeks after a missed period](#).” With such a small window of time between knowledge of the pregnancy and the ability to receive a legal abortion within the time constraints implemented by the Act, it is likely that many people will be forced to make impulsive and last-minute decisions about their bodies.

Furthermore, barriers to abortion that are already in place in Texas further compress the time frame: Texas law requires someone to make [at least two visits](#) to an abortion facility to have an abortion. The first visit is to have an ultrasound 24 hours before the procedure, and the second visit is for the procedure itself. With the new Heartbeat Act, this gives someone less than two weeks after finding out they are pregnant to decide to have an abortion and make all the necessary arrangements to schedule an appointment with an abortion provider.

This law will impact people from marginalized communities the most, particularly those who are low-income and unable to arrange time off work on such short notice, or who may have other responsibilities such as childcare that hinder their ability to access abortions before six weeks have passed. Furthermore, as of 2019, there were only [22 open abortion clinics](#) in the state of Texas, which further reduces access to abortion. If the closest clinic is hours away, transportation could reduce a person’s ability to comply with the two-week window even further.

Ongoing Challenges to the Heartbeat Act



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Because of the legal controversy of the Texas Heartbeat Act, efforts were made to block the law shortly after it was enacted. Abortion activists submitted an [emergency request](#) the day after the law was enacted requesting the Supreme Court to block the law from going into effect. This request was rejected, however, in a 5-4 decision. A week after, on September 9, the U.S. Department of Justice filed a lawsuit challenging the law. While the district court granted

a [preliminary injunction](#) against enforcement of the law on October 6, the Fifth Circuit Court of Appeals [stayed](#) this injunction only two days later. As of October 18, the Department of Justice has [requested the Supreme Court](#) to vacate the Court of Appeals' decision to stay the injunction. Meanwhile, a separate challenge to the law, [Whole Woman's Health v. Jackson](#), involves a similar request for an injunction against enforcement of the law. This case is currently pending in the Fifth Circuit Court of Appeals, although the petitioners have submitted a request for the Supreme Court to consider the case on an expedited basis.

The Future of Reproductive Justice

The future of the Texas Heartbeat Act could indicate where abortion laws in the United States are heading. The law, along with Mississippi's Gestational Age Act, directly contradict the precedent set by *Roe v. Wade*. If upheld, these laws would empower other states to implement similarly restrictive statutes. Many states already have "[trigger laws](#)" designed to automatically enact laws to ban abortion if *Roe v. Wade* is ever overturned, and in 2021 there has been an increase in laws that restrict abortion access. The Supreme Court's decision on the Heartbeat Act will signal the future of reproductive justice not only for the state of Texas, but for the entire nation.

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