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Legal Sidebar

The Texas Heartbeat Act (S.B. 8), *Whole Woman's Health v. Jackson*, and *United States v. Texas*: Frequently Asked Questions

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The Texas Heartbeat Act (S.B. 8) is a state law that prohibits physicians from performing or inducing an abortion once a fetal heartbeat is detected. Since S.B. 8 took effect on September 1, 2021, Texas abortion providers have generally stopped performing the procedure after an embryo's gestational age is six weeks from the first day of a patient's last menstrual period (LMP), a point when cardiac activity is often detectable. With abortions generally unavailable beginning six weeks from the LMP, Texas women have reportedly been travelling to neighboring states to obtain the procedure.

On November 1, 2021, following a rare grant of a writ of certiorari before judgment, the Supreme Court is scheduled to hear oral argument in two cases involving S.B. 8. Both cases address how novel features of S.B. 8 might affect the availability of judicial review. In *Whole Woman's Health v. Jackson*, the Court is to evaluate whether private plaintiffs (here, abortion providers) can challenge a state law that prohibits the exercise of a constitutional right by delegating enforcement of that prohibition to the general public. In *United States v. Texas*, the Court is to consider whether the United States may raise such a challenge and obtain injunctive or declaratory relief to prohibit S.B. 8 from being enforced. This Legal Sidebar provides answers to frequently asked questions about S.B. 8, including questions involving the two cases challenging the Texas law.

What substantive requirements does S.B. 8 impose?

S.B. 8 prohibits physicians from performing or inducing an abortion once a fetal heartbeat is detected. A "fetal heartbeat" is defined as "cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac." Cardiac activity is generally detectable once an embryo reaches a gestational age of six weeks from the LMP. A physician may perform an abortion after a fetal heartbeat is detected only if the physician believes that a medical emergency requires the procedure. S.B. 8 does not include other exceptions, such as exceptions for pregnancies resulting from rape or incest.

S.B. 8 is enforceable only through private civil actions. Any person, other than a state or local officer or employee, may bring a civil action against someone who:

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- performs or induces an abortion in violation of S.B. 8;
- knowingly engages in conduct that aids or abets the performance or inducement of an abortion prohibited by S.B. 8, including paying for or reimbursing the costs of the procedure; or
- intends to perform or induce an abortion in violation of S.B. 8, or intends to aid or abet the performance or inducement of an abortion in violation of S.B. 8.

S.B. 8 does not authorize civil or criminal proceedings against a woman who seeks or receives an abortion. If a claimant is successful, a court is to award injunctive relief to prevent the defendant from violating S.B. 8; damages of not less than $10,000 for each abortion performed or induced; and legal costs and attorney's fees. S.B. 8 prohibits a court from awarding costs or attorney's fees to a defendant, even if the claimant is unsuccessful. A civil action to enforce S.B. 8 must be brought within four years of the date the abortion is performed.

S.B. 8 is different from many of the other state laws the Supreme Court has considered recently, which have generally regulated the availability of abortions rather than broadly prohibited the procedure. For example, in *June Medical Services v. Russo*, the Court considered the constitutionality of Louisiana's Act 620, which required physicians who perform abortions to have admitting privileges at a hospital located within 30 miles from the place where an abortion is performed or induced. State laws that prescribe waiting periods before an abortion may be performed or require parental notification for minors seeking the procedure similarly regulate rather than prohibit the availability of abortions.

How is S.B. 8 novel?

S.B. 8 is novel from a procedural standpoint. Most state laws regulating abortion provide for civil or criminal enforcement by government actors. For example, the Mississippi Gestational Age Act at issue in a separate Supreme Court case, *Dobbs v. Jackson Women's Health Organization*, allows the state Attorney General or the Mississippi State Board of Medical Licensure to bring a civil suit in law or equity to enforce the statute. By contrast, S.B. 8 authorizes enforcement only through civil suits by private individuals.

By prohibiting enforcement by state officials, S.B. 8 may limit the ability of persons affected by the statute to challenge its constitutionality in court. The doctrine of state sovereign immunity generally bars individuals from suing any state directly without the state's consent. Accordingly, constitutional challenges to state laws often proceed via suits against state officials charged with enforcing those laws under the doctrine of *Ex parte Young*. Proponents of S.B. 8 have stated that the statute bars enforcement by state officials in order to prevent such suits. In addition, suits challenging abortion regulations are often brought by women seeking abortions, or by abortion providers, who may be permitted to raise constitutional claims on behalf of their patients. S.B. 8 does not, however, impose civil or criminal liability on women who seek or obtain abortions, which may limit the ability of those women to challenge the law, even if it effectively restricts their access to abortion. Moreover, the statute expressly limits the ability of defendants—including abortion providers or those who aid and abet prohibited abortions—"to assert the rights of women seeking an abortion."

S.B. 8 also contains several procedural provisions that shift the burden of litigation onto defendants. For instance, the statute allows a prevailing plaintiff to recover costs and attorney's fees but forbids awards of costs and attorney's fees to defendants. The statute also allows private parties to bring suit in "the county of residence for the claimant if the claimant is a natural person residing in [Texas]" and forbids transfer of suits without the written consent of all parties. That means that defendants may be subject to suit anywhere in Texas, potentially far from where they live and work, without the opportunity to transfer their cases to a more convenient venue.

How has litigation proceeded in the Supreme Court cases concerning S.B. 8?

Two cases challenging S.B. 8 are currently pending before the Supreme Court. In the first case, *Whole Woman's Health v. Jackson*, a number of abortion providers and advocates brought suit in a federal district court in Texas against defendants including the Texas attorney general and the clerks and judges of Texas state courts that could hear claims brought under S.B. 8. The plaintiffs filed suit before the September 1, 2021, effective date of S.B. 8, seeking to prevent the statute from taking effect. The Texas government defendants moved to dismiss the claims against them on sovereign immunity grounds. The district court denied the motion to dismiss, and the defendants appealed to the Fifth Circuit. The Fifth Circuit, among other things, stayed the district court proceedings pending appeal. On August 30, 2021, the plaintiffs filed an emergency application for injunctive relief in the Supreme Court, seeking to prevent the enforcement of S.B. 8 while the appeal continued in the Fifth Circuit. The Supreme Court denied the application on September 1, 2021, shortly after the statute went into effect. In a short, unsigned opinion, the Court stated that the plaintiffs "have raised serious questions regarding the constitutionality of the Texas law at issue. But their application also presents complex and novel antecedent procedural questions on which they have not carried their burden." For instance, the majority held, it was unclear whether Texas executive officials had the authority to enforce S.B. 8 or whether the state judges were proper defendants under *Ex parte Young*. Chief Justice Roberts and Justices Breyer, Sotomayor, and Kagan each wrote a dissent. Following the Supreme Court's decision, litigation continued in the Fifth Circuit. On September 23, 2021, the plaintiffs filed a petition for a writ of certiorari before judgment in the Supreme Court, which the defendants opposed.

In the second case, *United States v. Texas*, the United States sued the State of Texas, seeking an order barring enforcement of S.B. 8. The district court granted a preliminary injunction. The Fifth Circuit stayed the injunction "for the reasons stated" in the Fifth Circuit and Supreme Court decisions in *Whole Woman's Health*, allowing the statute to take effect. The United States then filed in the Supreme Court an emergency application to vacate the stay that also sought a writ of certiorari before judgment. The federal government argued that the "concerns raised in *Whole Woman's Health* are wholly inapplicable in this suit by the United States against Texas itself" because the state does not enjoy sovereign immunity in suits brought by the federal government. The United States further contended that "S.B. 8 is clearly unconstitutional and . . . the United States has authority to seek equitable relief to protect its sovereign interests—including its interest in the supremacy of federal law and the availability of the mechanisms for judicial review . . . long deemed essential to protect constitutional rights." Texas opposed the application, arguing that the case is not justiciable because Texas and its officials are not adverse to the United States and the abstract determination of a law's constitutionality is not a justiciable controversy; the federal government lacks standing to sue because it is not injured by S.B. 8; and the United States identifies no legal authority that authorizes the broad injunction it seeks.

On October 22, 2021, the Supreme Court granted the petitions for a writ of certiorari before judgment in *Whole Woman's Health* and *United States v. Texas*. In *Whole Woman's Health*, the petition for certiorari focused on the question of whether the procedural features of S.B. 8 made judicial relief unavailable to private plaintiffs. In *Texas*, the Court specified that the grant of certiorari was "limited to the following question: May the United States bring suit in federal court and obtain injunctive or declaratory relief against the State, state court judges, state court clerks, other state officials, or all private parties to prohibit S.B. 8 from being enforced." The Court scheduled both cases for oral argument on November 1, 2021—an unusually compressed timeline for Supreme Court merits cases. The Court allowed S.B. 8 to remain in effect while it considers these cases; Justice Sotomayor dissented from that aspect of the Court's decision in *Texas*.

What is certiorari before judgment?

In cases commenced in the lower federal courts, the Supreme Court ordinarily does not consider a case (if at all) until the federal court of appeals has issued a final judgment or other appealable order. However, the Supreme Court can elect to consider a case before the appeals court rules through a procedure known as *certiorari before judgment*. This procedure essentially allows a case to skip the court of appeals and instead move directly to the Supreme Court. Certiorari before judgment is authorized by 28 U.S.C. § 2101(e) and governed by Supreme Court Rule 11. Rule 11 provides that a petition for a writ of certiorari before judgment "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." The Court has historically granted such petitions sparingly.

Will the Supreme Court consider whether the abortion prohibition in S.B. 8 is constitutional?

Although the Supreme Court has agreed to hear two challenges to S.B. 8, the Court may choose not to consider the constitutionality of the statute's abortion provisions at this time. The procedural nature of the question presented in *Whole Woman's Health*, and the Court's limited grant of certiorari in *United States v. Texas*, could suggest that the Court is currently focused on the procedural questions related to the statute rather than its substance. If the Court determines that the plaintiffs in the S.B. 8 cases have not identified a justiciable controversy or demonstrated standing to sue, or that Texas's sovereign immunity bars some challenges to the statute, that would mean the federal courts lack jurisdiction to reach the merits of certain claims or the cases in their entirety. Even if the Court determines that one or more of the plaintiffs has standing to sue and has raised an appropriate claim for relief, it might limit its ruling to those procedural matters and remand the cases to the lower courts for further consideration.

If the Court declines to consider the merits of S.B. 8's abortion restrictions in the current litigation, it does not mean those restrictions will never be subject to constitutional scrutiny. If the Court holds that the federal courts have jurisdiction over claims in one or both of these cases, the parties can litigate the constitutionality of the abortion restrictions in the lower courts and seek Supreme Court review of those courts' rulings.

Other cases may also allow for constitutional review of S.B. 8, possibly including review by the Supreme Court. Both of the S.B. 8 cases discussed above are what some commentators call offensive challenges—suits preemptively seeking to prevent enforcement of the statute. Persons affected by S.B. 8 can also challenge the statute in a defensive posture by violating the statute, being sued, and defending on the ground that the statute is unconstitutional. In September of 2021, a Texas doctor publicly announced that he had violated S.B. 8; several people promptly sued him in Texas state court. Multiple challenges to S.B. 8 have also been filed in Texas state court and transferred to the state's multidistrict litigation court. The state courts hearing those cases may consider whether S.B. 8 violates the U.S. Constitution, and the parties in the state court litigation may seek Supreme Court review of an eventual decision of the Supreme Court of Texas. Because review by writ of certiorari is discretionary, the Supreme Court could decline to consider future litigation concerning S.B. 8. It is unlikely as a practical matter that the Court would consider any such challenges this term.

How would *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* apply to S.B. 8?

The private plaintiffs in *Whole Woman's Health* and the United States in *United States v. Texas* seek adjudication of whether S.B. 8's abortion restrictions are consistent with the constitutional right to an abortion, as defined and elaborated by the Supreme Court in *Roe v. Wade* and subsequent cases. In *Roe*, a

majority of the Court determined that a right of privacy derived from the Fourteenth Amendment's concept of personal liberty under the Due Process Clause was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." At the same time, the Court indicated that the right to an abortion was not unqualified and had to be considered against important state interests in promoting maternal health and protecting potential life.

The *Roe* Court held that the state interests become sufficiently compelling to sustain regulation of the abortion procedure at certain points during a woman's pregnancy and established a trimester framework to examine such regulations. Finding that an abortion is no more dangerous to maternal health than childbirth in the first trimester of a woman's pregnancy, the Court concluded that the compelling point for regulating abortion to further a state's interest in maternal health was at approximately the end of the first trimester—that is, at about 12 weeks. Until that point, the abortion decision was left exclusively to the medical judgment of the pregnant woman's doctor in consultation with the patient. After the end of the first trimester, however, the state could promote its interest in maternal health by regulating the abortion procedure in ways reasonably related to maternal health. The compelling point with respect to the state's other interest in potential life was at viability, a point in fetal development when the fetus is potentially able to live outside of the mother's womb. Viability generally occurs at 23 weeks or greater in a pregnancy. The Court indicated that a state could regulate and even proscribe the procedure after viability, except when necessary to preserve the life or health of the mother.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a plurality of the Court rejected *Roe*'s trimester framework, explaining that "in its formulation [the framework] misconceives the pregnant woman's interest . . . and in practice it undervalues the State's interest in potential life[.]" In its place, the plurality adopted an undue burden standard, holding that an abortion regulation is unconstitutional if it places "a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." The Court indicated that the new standard better reconciled the government's interest in potential life with a woman's right to decide to terminate her pregnancy. While *Roe* generally restricted the regulation of abortion during the first trimester, *Casey* emphasized that not all of the burdens imposed by an abortion regulation were likely to be undue.

In adopting the new undue burden standard, *Casey* nonetheless reaffirmed the "essential holding" of *Roe*, which the Court described as having three parts. First, a woman has a right to choose to have an abortion prior to viability without undue interference from the state. Before viability, the Court explained, the state's interests "are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure." Second, the state has a right to restrict abortions after viability so long as the regulation provides an exception for pregnancies that endanger a woman's life or health. Third, the state has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus.

Unlike state laws that only regulate abortion, S.B. 8 prohibits the performance of an abortion once a fetal heartbeat is detected. Other state laws that attempted to prohibit the procedure once a fetus reached a certain gestational age have similarly banned, rather than regulated, abortion. Courts examining such abortion prohibitions have consistently held that pre-viability abortion bans conflict with *Roe* and *Casey*. In *McCormack v. Herzog*, for example, the U.S. Court of Appeals for the Ninth Circuit invalidated Idaho's Pain-Capable Unborn Child Protection Act, which prohibited abortions once a fetus reached a gestational age of 20 weeks. The Idaho ban applied regardless of whether the fetus attained viability. While the Ninth Circuit acknowledged that a state could act to protect the health and safety of a woman seeking an abortion, it emphasized that the state may not wholly restrict a woman's ability to have an abortion before viability. Examining the Idaho law, the court observed: "[T]he broader effect of the statute is a categorical ban on all actions between twenty weeks gestational age and viability. This is directly contrary to the Court's central holding in *Casey* that a woman has the right to 'choose to have an abortion before viability and to obtain it without undue interference from the State.'"

S.B. 8 prohibits the performance or inducement of an abortion once a fetal heartbeat is detected, which generally occurs when an embryo is six weeks post or after LMP. By prohibiting the availability of the procedure before viability, S.B. 8 would seem to be in conflict with *Roe* and *Casey*. In denying an application to enjoin S.B. 8 in September of 2021, a majority of the Supreme Court acknowledged the "serious" constitutional questions raised by the law. The majority indicated, however, that its decision was "not based on any conclusion about the constitutionality of Texas's law." In dissent, Justice Sotomayor, joined by Justices Breyer and Kagan, contended that "[t]he Act is clearly unconstitutional under existing precedents."

Are *Whole Woman's Health v. Jackson and United States v. Texas* connected in any way to *Dobbs v. Jackson Women's Health Organization*, another abortion case before the Supreme Court this term?

In *Dobbs v. Jackson Women's Health Organization*, the Supreme Court is to consider whether all pre-viability prohibitions on elective abortions are unconstitutional. The State of Mississippi argues in *Dobbs* that its Gestational Age Act (GAA), which generally prohibits an abortion once a fetus's gestational age is greater than 15 weeks, should be upheld despite the Court's holdings in *Roe* and *Casey*. Mississippi contends that those cases were wrongly decided, and that the GAA furthers valid state interests in protecting the unborn, women's health, and the medical profession's integrity. *Dobbs* is currently scheduled for oral argument on December 1, 2021.

S.B. 8 also prohibits abortions before fetal viability. Unlike the GAA, however, S.B. 8's prohibition applies earlier in a woman's pregnancy. As pre-viability abortion prohibitions, both laws would appear to be in conflict with *Roe* and *Casey*. In its response to the Department of Justice's petition for a writ of certiorari before judgment, Texas argued that the Court should overturn *Roe* and *Casey* if it reaches the merits of the case. Texas contended that the Constitution does not protect a right to elective abortion and that laws affecting abortion should be subject only to rational basis review, a level of judicial scrutiny that is generally deferential to government action. This position is similar to the one held by Mississippi in *Dobbs*.

Although the Court is scheduled to hear argument in the S.B. 8 cases before it hears argument in *Dobbs*, the S.B. 8 cases are expected to involve a more limited set of procedural questions about the availability of judicial review. It is therefore possible that the Court in *Dobbs* will provide the Court with an opportunity for fuller consideration of the application of *Roe* and *Casey.*

How would federal legislation like the Women's Health Protection Act (H.R. 3755/S. 1975) affect S.B. 8, if it were enacted?

If enacted, the Women's Health Protection Act (WHPA) (H.R. 3755/S. 1975) would guarantee health care providers a statutory right to provide abortion services and preempt any state law that limits or restricts that right. The WHPA would also establish a corresponding right for patients to obtain abortion services unimpeded by state law restrictions, such as pre-viability abortion prohibitions. The WHPA responds to state abortion restrictions that are perceived as "neither evidence-based nor generally applicable to the medical profession or to other medically comparable outpatient gynecological procedures." If enacted, the WHPA could be construed to preempt S.B. 8. The House of Representatives passed the WHPA on September 24, 2021, by a vote of 218-211. The bill is awaiting further consideration in the Senate.

How does the S.B. 8 litigation relate to broader discussions about federal judicial procedure?

One key question presented in the S.B. 8 litigation is whether states can enact legislation that limits the exercise of constitutional rights but evades federal judicial review. Following the enactment of S.B. 8, other states considering legislation that might conflict with the Constitution or federal statutory law are also exploring similar private enforcement mechanisms. Such proposals could apply outside the context of abortion regulation. As examples, the federal government and some commentators have expressed concerns that states might enact legislation authorizing private civil suits targeting the sale of firearms (thus limiting Second Amendment rights) or the expression of certain viewpoints (limiting First Amendment rights).

In addition, the S.B. 8 cases have fueled ongoing discussion of the Supreme Court's non-merits decisions, sometimes informally called the "shadow docket." As a recent Legal Sidebar discusses in more detail, the Supreme Court's non-merits decisions have attracted increasing attention from legal commentators and the political branches of the federal government in recent years. The Court's September 2021 ruling in *Whole Woman's Health*, disposing of the emergency application for injunction through an unsigned non-merits opinion, prompted renewed debate around the Court's non-merits decisions. The Court also ruled on the petitions for writs of certiorari before judgment through non-merits orders; however, following the grants of certiorari before judgment, the litigation is now set to proceed on the Court's merits docket.

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