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Trend/Event Story

Texas Abortion Law (S.B. 8)

On September 1, 2021, a new law went into effect in Texas banning abortions after 6 weeks of pregnancy. This Texas legislature, called S.B. 8, is one of the most restrictive abortion laws currently in effect in the United States, and some are raising serious doubts about its' constitutionality and how long it will remain in effect.

S.B. 8 is unique in that it allows private citizens to enforce the law, rather than the state of Texas. Both Texas residents and out-of-staters may sue anyone who aids in an illegal abortion, including but not limited to doctors, family members, and Uber drivers. If successful in their case, plaintiffs will receive a \$10,000+ prize. In addition to this, plaintiffs have four years from the time the procedure was completed to file and receive this reward.

Northeastern University Law Professor Martha Davis said that S.B. 8 "clearly results in something that's unconstitutional." But overturning this legislature, in her opinion, may not be as difficult as some are making it seem.

"The Supreme Court said it was complicated. It's not that complicated." Davis said, "I think that the Department of Justice is going to get a very strong argument."

Harvard University Law Professor David Rosenberg said on the constitutionality of S.B. 8: "The Constitution has been read quite decisively to outlaw private lawsuits that restrict

constitutional rights.” He also said that “the quickest way [to overturn S.B. 8] would be through the state courts,” which could take place in the span of weeks.

Davis said about the intentions behind S.B. 8: “It’s an effort to get the court to overturn *Roe*...They crafted it specifically in a way to try to confound courts by setting up this bounty.” However, she thinks that the temporary restraining order brought by the federal government “is a strong rebuke, and argues that the state of Texas or no state should be able to get away with using that kind of subterfuge to undermine federally protected constitutional rights.”

Another element that complicates the overturning of S.B. 8 is that no “real” lawsuits have been filed in the month that it’s been in effect. Of the two suits filed so far, both plaintiffs actually oppose S.B. 8 and want to create grounds to overturn it, said Rosenberg.

In Rosenberg’s opinion, however, any counter-claims filed against these existing suits are ineffective, due to the plaintiffs’ “collusive” natures. “Somebody’s going to have to stand up...show that they oppose abortion, and have always opposed abortion...and that day has not yet come,” Rosenberg said.

Boston University Public Health Professor George Annas said about S.B. 8: “It is unconstitutional, at least until the Supreme Court overturns *Roe*...This is completely inconsistent with the core of *Roe*, which is that the state can’t prohibit abortion prior to fetal viability.”

Annas believes there is a chance S.B. 8 will take the US Supreme Court in a different direction. “Everyone assumes that there are at least six votes to overturn *Roe* right now. And that the Mississippi case will give the court a good opportunity to try to do that,” he said.

The Mississippi case that Annas refers to is also known as *Dobbs v. Jackson Women's Health Organization*, which is set for argument at the Supreme Court of the United States on December 1, 2021. The Supreme Court is expected to rule on the constitutionality of pre-viability abortion bans, possibly resulting in a change to *Roe v. Wade*.

S.B. 8 and the Dobbs case are undeniably interconnected with each other: "It might well be that a court would wait to rule on the merits of the Texas case, pending the Supreme Court's resolution of the Mississippi case," said Davis, because if *Roe* is altered to allow the banning of pre-viability abortions, many arguments against S.B. 8 will be invalid.

Rosenberg, however, thinks that it will take more than S.B. 8 to create any change in federal abortion laws: "In the end, this thing hasn't got any legs for a very clear reason: no one in power likes to be disempowered," essentially, the Supreme Courts of Texas and of the United States don't want to be subject to the rulings of a lower court.

At the end of the day, S.B. 8 has "been effective from the anti-choice perspective in really making the lives of almost all women very complicated in terms of controlling their lives and bodies," according to Davis. At the moment, it seems like this Texas law will continue to "terrorize women", as Annas put it, until either the Dobbs case reaches a conclusion or an honest lawsuit is filed in Texas.

Sources

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