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***Wade's* Way No More? The Future of Reproductive Rights in Light Of Texas Senate Bill 8's Constitutionality**

Dolly Suresh*

Pro-choice versus pro-life: this is a discussion that has been at the forefront of American politics for quite some time now. Recently, Texas enacted Senate Bill 8 (“SB8”), known as the Texas Heartbeat Act, which places restrictions on when and under what conditions a pregnant individual may seek an abortion. The bill states that it is “an act relating to abortion, including abortions after detection of an unborn child’s heartbeat; authorizing a private civil right of action.”¹ SB8, introduced by Senator Bryan Hughes on March 11, 2021, was immediately followed a companion bill, HB 1515, filed by Representative Shelby Slawson, on March 12, 2021. The bill was then passed by Governor Greg Abbott on May 19, 2021, to be executed beginning September 1, 2021. The Texas Heartbeat Act has acquired quite a bit of criticism regarding its language and has also garnered the attention of the United States Supreme Court.²

What exactly does the Texas Heartbeat Act prohibit? It bans abortions after six weeks because that is when cardiac activity is detectable.³ Six weeks is often before many people even realize they possibly are pregnant.⁴ Previous similar legislation has been blocked by federal courts.⁵

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¹ S.B. 8, 87th Leg., Spec. Sess. (Tex. 2021).

² Nina Totenberg, *Supreme Court Upholds New Texas Abortion Law, For Now*, NPR (Sept. 2, 2021), <https://www.npr.org/2021/09/02/1033048958/supreme-court-upholds-new-texas-abortion-law-for-now>; Selena Simmons-Duffin, *The Texas Abortion Ban Hinges On ‘Fetal Heartbeat.’ Doctors Call That Misleading*, NPR (Sept. 3, 2021), <https://www.npr.org/sections/health-shots/2021/09/02/1033727679/fetal-heartbeat-isnt-a-medical-term-but-its-still-used-in-laws-on-abortion>.

³ Sarah McCammon, *What The Texas Abortion Ban Does - And What It Means For Other States*, NPR (Sept. 1, 2021), <https://www.npr.org/2021/09/01/1033202132/texas-abortion-ban-what-happens-next>.

⁴ *Id.*

⁵ *Id.*

The Texas law slightly differs from such previously introduced bills in that it empowers individuals to bring civil lawsuits against abortion providers or any else found to “aid or abet” illegal abortions rather than requiring that public officials enforce the law.⁶ Any individual who successfully sues an abortion provider could be awarded at least *at least* \$10,000.⁷ In order to create a reporting procedure, the anti-abortion organization Texas Right to Life created a website where people can anonymously submit tips of suspected SB8 violators.⁸ According to John Seago, a representative of Texas Right to Life, “the lawsuits would be against the individuals making money off of the abortion, the abortion industry itself. So this is not spy on your neighbor and see if they’re having an abortion.”⁹ In response, a coalition of abortion providers and reproductive rights groups said the law “places a bounty on people who provide or aid abortions, inviting strangers to sue them.”¹⁰

In a neck and neck vote,¹¹ the U.S. Supreme Court weighed in on Wednesday, September 2, and refused to block the bill.¹² The opinion stated, “in particular, this order is not based on any conclusion about the constitutionality of Texas’s law, and in no way limits other procedurally proper challenges to the Texas law, including in Texas state courts.”¹³ Chief Justice Roberts and the Court’s three liberal judges dissented with this opinion.¹⁴ While this does not mean the case will not return to the Supreme Court for various other issues, it is unlikely to be litigated in front of the Supreme Court for at least several months.¹⁵ However, there is

⁶ *Id.*

⁷ *Id.*

⁸ *See supra* note 3.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² Nina Totenberg, *Supreme Court Upholds New Texas Abortion Law, For Now*, NPR (Sept. 2, 2021), <https://www.npr.org/2021/09/02/1033048958/supreme-court-upholds-new-texas-abortion-law-for-now>.

¹³ *Whole Woman’s Health et al. v. Austin Reeve Jackson, Judge, et al.*, 594 U.S. 1, 2 (2021).

¹⁴ *Id.*

¹⁵ *Id.*

discussion on how SB8 interacts with *Roe v. Wade*. In *Roe*, the Court provided that a state criminal abortion statute only allowing abortions when needed to save mother's life violated the Fourteenth Amendment's Due Process Clause.¹⁶ The Texas Heartbeat Bill is careful to include in Section 2 that "the legislature finds that the State of Texas never repealed, either expressly or by implication, the state statutes enacted before the ruling in *Roe v. Wade*, 410 U.S. 113 (1973), that prohibit and criminalize abortion unless the mother's life is in danger."¹⁷ While this section has been implemented into the bill, there are still certain points that are at odds with previous precedent such as the conflicting timelines, since this bill bans abortions at six weeks and *Roe* bans abortions between twenty-two to twenty-four weeks.¹⁸ The established procedure to challenge a state law is to sue the officials who are charged with enforcement, but by allowing citizens to oversee enforcement is how the bill was insulated from quickly being tested in court.¹⁹

Additionally, there is a discrepancy between SB8's definition and the medically correct definition of "fetal heartbeat." SB8 defines "fetal heartbeat" as "cardiac activity or the steady and repetitive rhythmic contraction of the fetal heart within the gestational sac" and can use this marker to determine "the likelihood" of the fetus surviving the total gestational period.²⁰ However, renowned OB-GYN, Dr. Nisha Verma, states "the flickering that we're seeing on the ultrasound that early in the development of the pregnancy is actually electrical activity, and the sound that you 'hear' is actually manufactured by the ultrasound machine."²¹ This language has been a large point of contention between those who support and those who oppose the bill.

¹⁶ *Roe v. Wade*, 410 U.S. 113, 114 (1973).

¹⁷ See *supra* note 1.

¹⁸ See *supra* note 11.

¹⁹ *Id.*

²⁰ Selena Simmons-Duffin, *The Texas Abortion Ban Hinges On 'Fetal Heartbeat.'* Doctors Call That Misleading, NPR (Sept. 3, 2021), <https://www.npr.org/sections/health-shots/2021/09/02/1033727679/fetal-heartbeat-isnt-a-medical-term-but-its-still-used-in-laws-on-abortion>.

²¹ *Id.*

In conclusion, there are many controversial elements of the Texas Heartbeat Act including, but not limited to, the meaning of specific terms and its interaction with *Roe v. Wade*. SB8's reception, implementation, and enforcement moving forward will set precedent and pave the way for other State anti-abortion legislation. American women's reproductive rights are at stake, and with an unclear precedent, the next few years will be vital regarding the future of reproductive health and justice.

Edited by Alex Beezley