OVERVIEW

Senate Bill 8 (SB 8), which went into effect on September 1, 2021, makes abortion in Texas illegal as soon as embryonic cardiac activity is detectable. The law authorizes anyone to enforce the ban by suing people who help or are suspected of assisting a Texan to violate it by having an abortion. SB 8 thus bans most abortions after about six weeks of gestation, with exceptions only for medical emergencies. The bill does not define what constitutes a medical emergency.

Transvaginal ultrasound can detect embryonic cardiac activity as early as approximately six weeks of gestation. SB 8 uses the term “fetal heartbeat,” which is not clinically accurate. At six weeks of pregnancy, an embryo does not yet have a fully-developed heart and therefore cannot have a heartbeat. Vaginal ultrasounds completed at this time pick up the electrical flutters of the cells that will eventually form a heart; this activity is the result of differentiating cardiomyocytes making “functional contractile units mature enough to begin spontaneous contractions” that move blood around the primitive embryo. The fetal heart and circulatory system do not fully form until the end of 9 weeks gestation. The language of SB 8, however, equates any cardiac activity with a heartbeat. Thus, despite an embryo lacking a developed cardiovascular or circulatory system at six weeks gestation, the presence of maturing cardiac cells precludes abortion. Since most people do not know they are pregnant at six weeks of gestation, SB 8 serves to prohibit almost all abortions in the state of Texas.

SB 8 authorizes lawsuits against anyone who provides or helps a patient obtain an abortion after embryonic cardiac activity is detectable. People cannot sue patients. Liability under SB 8 is an undefined and vast spectrum. For example, people could sue doctors and receptionists at abortion clinics, friends or family who assisted another person in obtaining an abortion, ride-share drivers who transport patients, and insurance companies that pay for abortions. People could even sue someone who did not know they were assisting someone else in obtaining a prohibited abortion (e.g., lending someone money). Similarly, the law states that just the intent to help another person access prohibited abortion care is grounds for liability. SB 8 also transcends the state of Texas because anyone in the United States can bring a lawsuit against a Texan.

Plaintiffs who win such a lawsuit will be awarded at least $10,000 from the defendant. The court then prevents the plaintiff from performing or aiding in future prohibited abortions. In addition, successful plaintiffs receive reimbursement for their legal costs; however, victorious defendants are ineligible for such a refund. The only people who are not allowed to bring lawsuits under SB 8 are government officials or entities and rapists who cause a terminated pregnancy.

SB 8 is unique because it calls on private citizens to enforce the ban rather than the State of Texas. Citizen enforcement establishes a civil violation rather than a crime. Since state officials are not legally responsible for enforcing the content of the law, they claim they cannot be sued, which makes it harder to demonstrate that SB 8 is unconstitutional.
**LEGALITY**

SB 8’s prohibition on abortion is unconstitutional under existing law. Beginning with *Roe v. Wade*, Supreme Court decisions have consistently said that states may not ban abortion before the fetus is viable—a point that occurs much later in pregnancy than six weeks. Despite this, SB 8 is harder to challenge in court than other abortion restrictions. Usually, clinics and others affected by unconstitutional abortion restrictions have two options to fight a law:

1. Sue for an “injunction” blocking the law before the law’s effective date. When this happens, the court considers ordering a government official(s) not to enforce the law because it is unconstitutional;

   **OR**

2. Violate the law and raise that law’s unconstitutionality as a defense in that case. Violating the law is a less appealing option because it compels someone to break the law intentionally. If the defendant loses, they risk facing legal sanctions.

SB 8 was purposefully designed to prevent clinics from using either approach. Concerning the first option, only private individuals can enforce the law through private lawsuits. Since no government official enforces the law, there is no one to sue and no one for the court to order not to administer the law. Regarding the second option, the law carries enormous penalties. It contains deterrents for anyone considering violation — for instance, providers can face an unlimited number of lawsuits for a single abortion by anyone in any county in Texas.

**THE LAWSUITS**

*Whole Woman’s Health v. Jackson*

In federal court, abortion providers and abortion funds sued state court judges, state court clerks, some state officials, and one private individual who previously indicated an intent to use SB 8 to sue providers. The state officials claimed they could not be sued over this law because only private parties enforce it, and the judges declared that they had a special form of immunity from suit called “sovereign immunity.” The private individual made the same arguments. The trial court disagreed. The defendants then immediately appealed this ruling to the Fifth Circuit court of appeals.

A hearing on the law in the trial court was scheduled for August 30, 2021. The defendants appealed the denial of their motion on August 25. Upon receiving the appeal, the appeals court put the case on hold and ordered the trial court to cancel the August 30 hearing. On August 30, the plaintiffs appealed to the Supreme Court, asking to stop the law from going into effect while the case moved forward. The court did not intervene before the law went into effect on September 1.

Late in the day on September 1, the Supreme Court ruled that it would not intervene to block the law at this time. It did NOT say that the law was constitutional – only that the case was procedurally complex, and therefore it was not convinced the case could be brought. The case went back to the appeals court. On September 10, that appeals court again ruled that it would not block the law for the time being and ordered the case to be considered on an expedited schedule. On September 23, the plaintiffs again asked the Supreme Court to step in without waiting for the Court of Appeals to rule on the case. The Supreme Court has not yet ruled on that request.

*United States v. Texas*

On September 9, the U.S. Department of Justice (DOJ) filed suit against Texas in federal court, arguing that SB 8 interferes with federal interests. The DOJ asserts the law violates Texans’ constitutional rights and interferes with specific federal programs requiring the government to assist people with obtaining abortions (e.g., those in government custody). The U.S. government is asked the court to block anyone from enforcing SB 8, including private individuals, arguing that those private individuals act on behalf of the state.
On October 6, the trial court issued a preliminary order blocking SB 8. After that order was handed down, some providers were able to resume providing abortions beyond six weeks gestation. However, the State of Texas quickly appealed, and on October 8, the Fifth Circuit Court of Appeals allowed SB 8 to go back into effect while the litigation continues. On October 15, the Biden administration announced it would again ask the Supreme Court to put a hold on the law.

**Planned Parenthood v. Texas Right to Life**

Planned Parenthood brought a claim in a Travis County, Texas, state court against Texas Right to Life (RTL) to prevent it and its members from suing under SB 8. Texas RTL set up a “tip line” website for people to report abortions that might be illegal under SB 8. The court issued a temporary order blocking RTL from suing, but this order applies only to Texas RTL and its members, and it protects only the providers who brought the suit or who work for Planned Parenthood. This lawsuit is now on hold, pending the outcome of the *U.S. v. Texas* case.

**Stilley v. Braid and Gomez v. Braid**

After Dr. Alan Braid, a physician based in San Antonio, announced in the *Washington Post* that he had performed an abortion in violation of SB 8, out-of-state plaintiffs filed two separate lawsuits against him in Texas state courts. Those lawsuits remain pending. They may provide an opportunity for the Texas courts, and ultimately the U.S. Supreme Court, to decide whether SB 8 is constitutional. However, the litigation is likely to take several years to complete, and the case could still be subject to dismissal before the claims are decided. In the meantime, Dr. Braid could face additional lawsuits based on the same abortion.

**WHAT’S NEXT?**

The current lawsuits involving SB 8 continue to work through the courts, and more could be filed. However, SB 8’s constitutionality is not likely to be decided imminently – meaning patients, providers, and others in Texas could be in legal limbo for months. In the meantime, the U.S. Supreme Court will hear a major abortion case out of Mississippi (*Dobbs v. Jackson Women’s Health Organization*) on December 1, 2021, and likely decide it in June 2022. This case has the potential to overturn or substantially modify *Roe v. Wade*; thus, it could also impact whether SB 8 remains enforceable.

**REFERENCES**


