

The Justice Dept. sues Texas over its new restrictive abortion law.



Katie Benner

September 21, 2021

New York Times

The Justice Department sued [Texas](#) on Thursday over its recently enacted law that prohibits nearly all abortions in the state, the first significant step by the Biden administration to fight the nation's most restrictive ban on abortion and a move that could once again put the statute before the Supreme Court.

The department argued that the law was unconstitutional because it allowed Texas to essentially prohibit [abortion](#) while technically complying with Supreme Court rulings that forbid such a ban by deputizing private parties to enforce the new restrictions.

Attorney General Merrick B. Garland called Texas' enforcement mechanism "an unprecedented" effort whose "obvious and expressly acknowledged intention" was to prevent women from exercising their constitutionally protected right to have abortions.

"This kind of scheme to nullify the Constitution of the United States is one that all Americans — whatever their politics or party — should fear," Mr. Garland said in a news conference at the Justice Department. "If it prevails, it may become a model for action in other areas, by other states, and with respect to other constitutional rights and judicial precedents."

The Justice Department is seeking an injunction that would prohibit enforcement of the Texas law. "It is settled constitutional law that 'a state may not prohibit any woman from making the ultimate decision to terminate her pregnancy before viability,'" [the lawsuit said](#). "But Texas has done just that."

Even though the Supreme Court [declined last week to block the Texas law](#), known as Senate Bill 8, it did so without ruling on whether it is constitutional. By placing that question at the heart of its lawsuit, the Justice Department could force the high court to consider factors that might lead to a different ruling should the justices choose to hear the case.

Both opponents and supporters of the law recognize that empowering private citizens to enforce abortion bans through civil litigation has the power to fundamentally change the landscape of the abortion rights fight. The battle has rested largely on whether the Supreme Court will overturn *Roe v. Wade*, the landmark 1973 decision that granted women the constitutional right to the procedure, paving the way for state bans on the practice. The Texas law essentially allows a state to all but ban abortions before a legal test of that watershed case.

"President Biden and his administration are more interested in changing the national narrative from their disastrous Afghanistan evacuation and reckless open border policies instead of protecting the innocent unborn," Renae Eze, a spokeswoman for Gov. Greg Abbott of Texas, said in a statement. "We are confident that the courts will uphold and protect that right to life."

Opponents of the law were heartened by the Justice Department's lawsuit, said Cecile Richards, the former president of Planned Parenthood. "We are in uncharted legal territory, a state where *Roe v. Wade* is no longer essentially in effect," she said.

Ms. Richards noted that millions of women in Texas "lost the right to make their own decisions about their pregnancy" with the passage of the law.

But proponents of the law see it as necessary to preserve the ability of state legislatures to save lives, long a central piece of the conservative platform. "The fact on the ground is that there are now hearts beating in Texas that would have been stopped had this law been prevented from going into effect," said Roger Severino, a senior fellow at the Ethics and Public Policy Center and a former Trump administration official who advocates on behalf of social conservative causes.

The Justice Department lawsuit came days after the Supreme Court [refused, in a 5-to-4 decision, to block](#) the Texas legislation, which bans all abortions after about six weeks of pregnancy and makes no exceptions for pregnancies that are the result of rape or incest.

The court had stressed that it was not ruling on the constitutionality of the Texas law. But the way the law was written — allowing anyone, regardless of whether they have any connection to an abortion, standing to sue those who perform or otherwise aid in the procedure — could make it difficult to challenge in court.

That set up a major shift in the fight over abortion rights and paved a path for other states to limit access to abortion. The law also raised alarms that abortion providers would face myriad lawsuits brought by private citizens.

The Justice Department filed its lawsuit in the Western District of Texas, based in Austin. No matter how the district court rules, both sides in the lawsuit are motivated to appeal, which would send the case to the conservative-leaning Fifth Circuit Court of Appeals. The Texas law could come before the Supreme Court again in several months.

It is not a foregone conclusion that the Supreme Court would again allow the Texas law to stand, said Laurence H. Tribe, a Harvard Law professor and leading liberal constitutional scholar.

“The complaint reaches beyond *Roe v. Wade* to encompass a structural attack on the basic design of the extraordinary Texas law,” Mr. Tribe said. The law’s structure, he argued, is an end run around seminal cases like *Marbury v. Madison* in 1803, which established the Supreme Court’s power to determine whether legislation and executive acts are consistent with the Constitution.

“Even conservatives are inclined to protect the power of the federal judiciary,” Mr. Tribe said.

But Mr. Severino noted that when the Supreme Court chose not to block the Texas law, it said that a party could not sue unless it was over an actual enforcement action that had been taken under the new law.

Mr. Garland said that Texas did not dispute that the law violates Supreme Court precedent, which bars states from preventing a woman from determining whether to terminate a pregnancy.

Rather, the Texas law effectively takes the state out of the equation. It insulates the state from responsibility by deputizing “all private citizens, without any showing of personal connection or injury, to serve as bounty hunters authorized to recover at least \$10,000 per claim from individuals who facilitate a woman’s exercise of her constitutional rights,” Mr. Garland said.

“The obvious and expressly acknowledged intention of this statutory scheme is to prevent women from exercising their constitutional rights by thwarting judicial review,” he added.

Mr. Garland also said that the Texas law exposed federal employees, including those at the Departments of Defense, Labor and Health and Human Services, to civil liability should they

exercise their authorities related to abortion services. He argued that that made the legislation invalid, both under the supremacy clause of the Constitution that gives precedence to federal law over state law and under the equal protection guarantees of the 14th Amendment.

Ms. Richards said that abortion rights advocates and women's health organizations were moving quickly to assist women in Texas who were seeking abortions, including helping them leave the state if they desired. "I'm sure we'll see in the coming weeks stories of exactly how cruel and harmful this is for people in Texas," she said.

The [Texas lawsuit](#) is the second time that the Biden administration's Justice Department has sued a state over a law passed by a Republican legislature that it views as unconstitutional or otherwise unlawful. In June, the department [sued Georgia](#) over a [sweeping voting law](#), [alleging](#) that lawmakers there intended to violate the rights of Black voters.

The Biden administration has made civil rights protections a priority. Beyond the lawsuits, it is also investigating whether several major city police departments, including in Minneapolis and Louisville, Ky., routinely violate the rights of people of color.

But the Justice Department has little power to combat Republican state legislatures that were emboldened by the conservative shift in the federal courts during the Trump administration. In Texas, the particularities of the law and the slow pace with which lawsuits wend through the judicial system will make it difficult for the department to protect abortion rights there in the near term.

The Supreme Court decision forced [Texas abortion](#) providers to turn patients away to comply with the new restrictions. It also raised fears that providers would face a rash of lawsuits filed by private citizens and anti-abortion groups poised to take advantage of the latitude the law grants them to sue anyone who aid or intends to aid women who seek the procedure.

The unsigned majority opinion said that the medical providers challenging the law had failed to make their case, but that the court was not ruling on whether the statute was constitutional.

Even so, it was also seen as a threat to [Roe v. Wade](#) and has invigorated advocates on both sides of the debate.

The court will soon take up a separate case that could determine whether *Roe v. Wade* should be overruled.

After opponents of the Texas law failed to persuade the Supreme Court to block it, Democrats and abortion rights activists pressured the Biden administration and Mr. Garland to act.

"We urge you to take legal action up to and including the criminal prosecution of would-be vigilantes attempting to use the private right of action established by that blatantly unconstitutional law," the chairman of the House Judiciary Committee, Representative Jerrold Nadler of New York, and 22 other House Democrats wrote in a letter to Mr. Garland this week.

Justice Department sues Texas to block six-week abortion ban

Devlin Barrett and Ann E. Marimow

September 10, 2021

Washington Post

The Biden administration sued Texas on Thursday to try to block the nation's most restrictive abortion law, which bans the procedure as early as six weeks into pregnancy and allows private citizens to take legal action against anyone who helps a woman terminate her pregnancy.

The law [took effect Sept. 1](#), effectively ending most abortions in the nation's second-most-populous state, with no exceptions for rape or incest.

The [suit filed by the Justice Department in federal court](#) in Austin asks a judge to “protect the rights that Texas has violated” by declaring the abortion law unconstitutional and issuing an injunction blocking its enforcement. At a news conference, Attorney General Merrick Garland said the ban “is clearly unconstitutional under long-standing Supreme Court precedent.”

“This kind of scheme to nullify the Constitution of the United States is one that all Americans, whatever their politics or party, should fear,” said Garland, warning that what he called the “bounty hunter” element of the law may become “a model for action in other areas by other states and with respect to other constitutional rights or judicial precedents.” The U.S. government, Garland added, has a responsibility “to ensure that no state can deprive individuals of their constitutional rights.”

A spokeswoman for Texas Gov. Greg Abbott (R) defended the law and accused the Biden administration of acting for political reasons — to distract Americans from the U.S. withdrawal from Afghanistan and the influx of migrants at the U.S.-Mexico border.

“We are confident that the courts will uphold and protect that right to life,” press secretary Renae Eze said in a statement.

The case has been assigned to District Court Judge Robert L. Pitman, who is already deeply familiar with the law: he is also presiding over a separate pending legal challenge to the abortion ban brought by a coalition of abortion providers and advocates.

In that case, Pitman had scheduled a hearing to consider whether to block enforcement of the ban before it took effect. But the conservative U.S. Court of Appeals for the 5th Circuit called off the hearing.

On Friday, the appeals court issued a new order saying it would hear a preliminary appeal of that earlier case on an expedited basis. The 5th Circuit's initial action led to an emergency petition to the Supreme Court, which [decided 5-4 to allow the Texas law to stand](#) while the litigation continues.

The Biden administration's suit argues that the Texas law violates the 14th Amendment's due process clause, saying the measure deprives women in Texas of the right to an abortion and imposes an "undue burden" — and that the Constitution generally takes precedence over state laws.

The suit also says the measure interferes with the federal government's constitutional obligation to provide access to abortion, including in cases of rape or incest, to people in the custody or care of federal agencies or government contractors, including at prisons.

President Biden and Democrats in Congress have criticized the Texas law and the initial refusal of the high court to block the ban.

Any action Pitman takes in response to the lawsuit is likely to be appealed to the 5th Circuit and, eventually, to return to the high court.

A dozen other states have passed legislation banning abortions after about six weeks into pregnancy. But federal judges have stopped those measures from taking effect, finding the laws inconsistent with *Roe v. Wade*, the 1973 Supreme Court decision guaranteeing the right to choose abortion before viability, usually around 22 to 24 weeks.

The Texas law was designed to withstand a similar preemptive legal challenge. It intentionally bars enforcement by state government officials, whom abortion providers would typically target in a lawsuit. Instead, the law empowers private citizens to file civil lawsuits against anyone who helps a woman get an abortion after the six-week window. Individuals can receive a \$10,000 award if their lawsuits are successful. They can sue abortion providers, clinic workers or those who help a woman pay for the procedure or drive her to a clinic.

In its 5-to-4 decision last week, the Supreme Court's conservative majority said abortion providers and civil rights groups had "raised serious questions regarding the constitutionality of the Texas law." But the court allowed the ban to take effect while the legal battle plays out, saying the abortion providers and advocates who had challenged the law could not show they were suing the right people.

Their lawsuit targeted state court judges and court clerks, who would have to accept lawsuits alleging violations of the ban for those suits to go forward. The majority said it was premature for the court to step in because it is "unclear whether the named defendants can or will seek to enforce the Texas law."

All of the dissenting justices wrote separately, with the court's three liberal justices characterizing the Texas law as an [end run around the Constitution](#) and court precedent.

Garland said Monday that his agency would do all it could to guarantee access to abortion in Texas. But advocates said the pledge lacked specifics; they [urged a direct challenge](#).

Asked Thursday about the intense pressure from Democrats to take action, Garland said the department "does not file lawsuits based on pressure. We carefully evaluated the law and the facts, and this complaint expresses our view of the law and the facts."

The lawsuit seeks to stop not only the state but also private individuals who would bring civil lawsuits to enforce the Texas law.

In response, Texas Attorney General Ken Paxton (R) tweeted, “Today the Biden Administration sued every individual in Texas” and said Biden should not meddle in a state’s “sovereign rights.”

Steve Vladeck, a constitutional law professor at the University of Texas law school, called the lawsuit “an ambitious and powerful” effort “to protect the constitutional rights of citizens.” The question, he said, is whether citizens who try to enforce the law are “agents of the state and therefore subject to the injunction the government is seeking.”

“That’s a very broad request for relief,” said Vladeck, who has been publicly critical of the way the law was designed to avoid judicial review, “but also perhaps necessary given the novel and cynical procedural traps Texas created.”

Supporters of the law put out a statement criticizing the federal lawsuit even before Garland’s news conference. They called the suit a “desperate attempt” to block the measure.

Biden “is a puppet of the radical abortion agenda, and his DOJ will quickly find that they do not have jurisdiction to stop the Texas Heartbeat Act,” said Elizabeth Graham, vice president of Texas Right to Life.

The law is already having an effect. Abortion clinics in Texas say they are abiding by the six-week ban and sending women who are further along in their pregnancies across state lines to seek the procedure.

Texas Right to Life, which backed the law, was collecting anonymous tips on its website about potential violations of the law, but so far no lawsuits have been filed against abortion providers in state court.

If such a lawsuit is filed, it would almost certainly be challenged, creating a new path for the constitutionality of the abortion ban to be reviewed by the courts.

Several advocacy organizations that help women access abortions already have won temporary restraining orders in local courts that bar Texas Right to Life and others from using the law to sue them.

But those court orders are limited to the people involved and do not stop other individuals or organizations from filing lawsuits against anyone involved in an abortion banned under the Texas law.

Biden Administration Sues Texas Over Its Abortion Law

Lawsuit targets state law limiting procedure to first six weeks of pregnancy

Sadie Gurman
September 10, 2021
Wall Street Journal

WASHINGTON—The Justice Department sued Texas Thursday to block [a new state law banning most abortions](#), saying it was enacted “in open defiance of the Constitution.”

“This kind of scheme to nullify the Constitution of the United States is one that all Americans, whatever their politics or party, should fear,” Attorney General Merrick Garland said at a news conference announcing the action.

The case sets up a federal-state clash over [the future of abortion rights](#), and a test of whether the department can upend a state law that Texas lawmakers drafted in a novel manner that makes it difficult for abortion-rights advocates to challenge the ban in court.

The Texas law dictates that a physician can’t knowingly perform an abortion if there is “a detectable fetal heartbeat,” including embryonic cardiac activity that appears about six weeks into a pregnancy. A provision of the law assigns enforcement to private parties, rather than state or local officials, and authorizes damages of \$10,000 or more to anyone who successfully sues a defendant accused of performing or aiding in such an abortion.

By putting enforcement powers in the hands of private citizens, rather than state or local officials, the Texas law has left its opponents without obvious individuals to sue.

“The obvious and expressly acknowledged intention of this statutory scheme is to prevent women from exercising their constitutional rights by thwarting judicial review for as long as possible,” Mr. Garland said.

[The suit](#), filed in federal court in Austin, said the federal government “has the authority and responsibility” to ensure that Texas doesn’t deprive individuals of their constitutional rights by attempting to evade the courts. It seeks a preliminary injunction to block the law while litigation continues, as well as a permanent order that the Texas ban is invalid and unenforceable.

Texas Gov. Greg Abbott defended the state law and called the Biden administration’s action a politically motivated distraction.

“Texas passed a law that ensures that the life of every child with a heartbeat will be spared from the ravages of abortion,” said a spokeswoman for the Republican governor. “We are confident that the courts will uphold and protect that right to life.”

The Justice Department alleged the Texas ban violates the Constitution’s Supremacy Clause, which commands that federal law is supreme to state law, as well as the 14th Amendment’s guarantee of due process of law, the basis for the Supreme Court’s recognition of a constitutional right to an abortion.

“The further risk here is that other states will follow similar models with respect not only to this constitutional right but, theoretically, against any constitutional right,” Mr. Garland said, warning that the Justice Department could take similar action against other states.

The department also alleged the state measure was pre-empted by federal law because it prohibited certain abortions “that federal agencies are charged with facilitating, funding, or reimbursing,” including through healthcare programs that cover the procedure in cases of rape or incest. The Texas law includes no exceptions for such cases.

The ban puts the Health, Defense and Labor departments in legal jeopardy for carrying out abortion-related services, the suit said.

While the Texas ban is in clear conflict with current Supreme Court precedent, the Justice Department may face other challenges to securing a favorable ruling.

The department, for example, could be hard-pressed to demonstrate it has the ability to sue on behalf of women in Texas, said Mary Ziegler, a law professor at Florida State University. She suggested the department could be considering other legal tools to fight the law, such as whether federal civil-rights law could apply.

“This is probably not the last thing we hear from the Biden administration, even if this is going to face some procedural obstacles,” she said.

After originally being assigned to another judge, the case was reassigned late Thursday to U.S. District Judge Robert Pitman, an Obama appointee who presided over earlier litigation in which

abortion providers challenged the Texas ban. The judge denied requests to dismiss the providers' claims and scheduled a hearing last month on whether to block the law, but an appeals court put those proceedings on hold, preventing him from issuing a ruling.

The Supreme Court let the Texas law go into effect last week after a majority of justices found no basis for the court to intervene, despite what they said were serious questions about the law's constitutionality.

The Biden administration had faced pressure from Democrats and abortion-rights groups to take action to stop the Texas law after the Supreme Court [allowed it to take effect](#), sending abortion providers and patients scrambling.

President Biden last week pledged a "whole-of-government effort" to respond to the Supreme Court's order allowing the Texas law to stand, and said he asked the Justice Department to explore ways to challenge it.

House Speaker [Nancy Pelosi](#) (D., Calif.) said [the chamber would vote later this month](#) on legislation to protect abortion rights by banning restrictions before fetal viability. The legislation is unlikely to pass the evenly divided Senate, where it would need 60 votes. Senate Majority Leader Chuck Schumer (D., N.Y.) hasn't announced a pending vote.

Other Democrats in Congress this week urged Mr. Garland to prosecute Texas residents who try under the new law to sue women seeking abortions.

"The Department of Justice cannot permit private individuals seeking to deprive women of the constitutional right to choose an abortion to escape scrutiny under existing federal law simply because they attempt to do so under the color of state law," Democrats on the House Judiciary Committee said Tuesday [in a letter to Mr. Garland](#).

Some abortion opponents and Republican lawmakers have hailed the law as a model for reversing the viability standard established by *Roe v. Wade* and subsequent Supreme Court decisions. "The Supreme Court just let Texas's pro-life law go into effect, saving countless innocent lives," tweeted Sen. Tom Cotton (R., Ark.), who is seen as a potential 2024 presidential candidate. "Why stop there? The Court should let every state set its own abortion laws by overturning *Roe v. Wade*."

The Justice Department has previously said it would be stepping up prosecutions of people who injure or intimidate abortion-clinic patients and employees under a federal law known as the 1994 Freedom of Access to Clinic Entrances Act, a statute that has been described as spottily enforced in the past. Mr. Garland said Monday the department had reached out to the Federal Bureau of Investigation and federal prosecutors across Texas to discuss how to enforce that law.

The Texas abortion law sets no limit on how much money those who sue to challenge abortions can recover. If they prevail, they can also demand that the losing party pay their legal bills. If they lose in court and their case is dismissed, they owe the defendant nothing.

The law permits several lawsuits to be filed by different individuals over a single abortion. Once a claimant collects damages, though, the others suing may not collect more money from the same defendant for the same violation.

In allowing the Texas law to take effect, the Supreme Court didn't rule on the measure's constitutionality. The Justice Department's new lawsuit could join legal challenges on the state level that seek to give courts a better opportunity to rule on the ban's validity.

In its next session, the Supreme Court is already slated to rule on [Mississippi's law](#) banning most abortions after 15 weeks, with the state arguing for an abolition of federal abortion rights. Lower federal courts have blocked that law for violating Supreme Court precedent. A ruling in that case is expected by next summer.