

Testimony of the Center for Reproductive Rights

November 4, 2021

House Committee on the Judiciary Hearing

“The Texas Abortion Ban and its Devastating Impact on Communities and Families”

Chairman Nadler, Ranking Member Jordan, and Members of the Committee:

The Center for Reproductive Rights respectfully submits the following testimony to the House Committee on the Judiciary. Since 1992, the Center for Reproductive Rights has worked toward the time when the promise of reproductive freedom is enshrined in law in the United States and throughout the globe. We envision a world in which every woman is free to decide whether and when to have children; every woman has access to the best reproductive health care available; and every woman can make medical decisions without coercion or discrimination. In short, we envision a world in which every woman participates with full dignity as an equal member of society.

One in four women in the United States will make the decision to have an abortion in the course of her lifetime.¹ The right to access abortion is constitutionally protected and has been recognized as such in an unbroken line of cases since *Roe v. Wade* nearly fifty years ago. Yet in large parts of the United States, obtaining abortion care is difficult—and in some cases, impossible—due to a coordinated, nationwide strategy to eliminate access to abortion care.

In September 2021, a draconian anti-abortion law went into effect in Texas, escalating the threat to the constitutional right to access abortion to unprecedented heights. Texas Senate Bill 8 (“S.B. 8”) bans abortion after just six weeks—eliminating the majority of abortion access in Texas and effectively making abortion care unavailable to the large number of patients who cannot overcome the logistical, financial, and discriminatory obstacles of traveling out of state to receive care.

But it’s not just Texas – states across the country have been chipping away at abortion rights for the past decade, and are newly invigorated by Texas’s seeming success in enacting a near-total abortion ban that is currently in effect. Several anti-abortion state lawmakers have already pre-filed similar bills or announced their intention to do so in the next legislative session.

Next month, abortion rights will face yet another challenge when the U.S. Supreme Court hears arguments in *Dobbs v. Jackson Women’s Health Organization*, a case in which the state of Mississippi urges the Supreme Court to overturn *Roe* and take away the constitutional right to abortion. This is the first case in which the Court will rule on the constitutionality of a pre-viability abortion ban since *Roe*, putting the continued existence of the constitutional right to abortion at stake.

¹ Rachel K. Jones & Jenna Jerman, *Population Group Abortion Rates and Lifetime Incidence of Abortion: United States, 2008-2014*, 107(12) AM. J. PUB. HEALTH 1904, 1908 (2017), <https://ajph.aphapublications.org/doi/pdf/10.2105/AJPH.2017.304042>.

I. Our Constitution protects the right of each of us to chart our own life path and to make the deeply personal decisions that impact our lives, our families, and our health, including whether and when to become a parent.

Almost fifty years ago, the Supreme Court recognized the Fourteenth Amendment’s liberty protections encompass the right to make deeply personal decisions about whether and when to become a parent. The landmark decision *Roe v. Wade* held that the right to end a pregnancy is fundamental to a woman’s personal liberty.²

In the following years, the Supreme Court repeatedly reaffirmed *Roe*’s central holding, recognizing that control over one’s own reproductive decisions is essential to health, liberty, dignity, and autonomy. In *Planned Parenthood v. Casey*, the Supreme Court explained that “the ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives.”³ In its analysis, the *Casey* Court recognized that, for decades, people have made deeply personal decisions about their lives and their relationships “in reliance on the availability of abortion.”⁴

The United States Constitution prohibits the government from enacting any law that bans abortion prior to the point in pregnancy when a fetus is viable and prohibits the government from arbitrarily designating a particular gestational age to establish when viability begins.⁵ The gestational age at which viability occurs varies from pregnancy to pregnancy and must be an individual determination for each pregnancy based on a variety of factors.⁶ After viability, state abortion restrictions must contain exceptions to safeguard the life and health of pregnant women.⁷ The Supreme Court has never wavered from this position, despite numerous opportunities to do so.

II. Access to this fundamental right is in crisis in the United States.

The systematic, sustained effort by lawmakers across the country to chip away at the right to abortion incrementally, restriction-by-restriction, has now reached a crisis point. In the last decade, states have passed more than 550 anti-abortion laws and restrictions.⁸ These abortion restrictions work in concert to shape a hostile environment for abortion patients and providers, to close abortion clinics, and to create nearly insurmountable cumulative barriers to abortion access.

² *Roe v. Wade*, 410 U.S. 113, 155, 153 (1973).

³ *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 835 (1992).

⁴ *Id.* at 856.

⁵ See *Roe v. Wade*, 410 U.S. 113, 163-64 (1973); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 64 (1976); *Colautti v. Franklin*, 439 U.S. 379 (1979). In *Gonzales v. Carhart* (“*Carhart II*”), 550 U.S. 124 (2007), the law at issue did not ban abortions in general or abortions at any particular point in pregnancy. Rather, it banned only *one abortion procedure*. Although the Supreme Court upheld that law, the Court emphasized that safe alternative abortion procedures were available and explained that its decision was fully consistent with past precedent. See, e.g., *id.* at 146 (stating that the decision is guided by the principle, *inter alia*, that “[b]efore viability, a State ‘may not prohibit any woman from making the ultimate decision to terminate her pregnancy,’” (quoting *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 879 (1992))).

⁶ As a general matter, viability does not exist prior to 24 weeks of pregnancy.

⁷ *Casey* at 846.

⁸ Elizabeth Nash & Lauren Cross, *2021 Is on Track to Become the Most Devastating Antiabortion State Legislative Session in Decades*, GUTTMACHER INST. (Apr. 2021), <https://www.guttmacher.org/article/2021/04/2021-track-become-most-devastating-antiabortion-state-legislative-session-decades#>.

As a result of the outsized efforts of state lawmakers to undermine and eliminate abortion access, there has been a drastic reduction in the availability of health care services across vast swaths of our country. Today, nearly 90 percent of American counties are without a single abortion provider,⁹ and five states are down to their last abortion clinic.¹⁰ More than twenty-seven cities across the country are “abortion deserts,” where patients must travel 100 miles or more to reach an abortion facility.¹¹

Fifteen states have also passed near-total bans on abortion, all of which have been blocked by courts or are not in effect—with the exception of Texas S.B. 8. These bans have been passed by: Alabama, Arkansas, Georgia, Idaho, Iowa, Kentucky, Louisiana, Ohio, Oklahoma, Mississippi, Missouri, North Dakota, South Carolina, Tennessee, and Texas.¹²

a. Texas Senate Bill 8 unconstitutionally prohibits pregnant people in Texas from accessing abortion care.

⁹ Data Center: Number of clinics providing abortion by state, GUTTMACHER INST., <https://data.guttmacher.org/states> (last visited Nov. 1, 2021).

¹⁰ Holly Yan, *These 6 States Have Only 1 Abortion Clinic Left*, CNN (May 29, 2019), <https://www.cnn.com/2019/05/29/health/six-states-with-1-abortion-clinic-map-trnd/index.html>. Since the publication of this article, a second clinic has begun offering abortion care in Kentucky.

¹¹ Alice F. Cartwright et al., *Identifying National Availability of Abortion Care and Distance From Major US Cities: Systematic Online Search*, 20(5) J. MED. INTERNET RES. e186 (2018), <https://www.jmir.org/2018/5/e186/>.

¹² Alabama - Act No. 2019-189, Reg. Sess. (Ala. 2019); *Robinson v. Marshall*, 415 F. Supp. 3d 1053 (M.D. Ala. 2019) (striking down near-total abortion ban). Arkansas - Act. 309, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021); *Little Rock Family Planning Services v. Jegley*, No. 4:21-cv-00453-KGB, 2021 WL 3073849 (July 20, 2021). Georgia - Act. H.B. 481 § 1, 115th Gen. Assemb., Reg. Sess. (Ga. 2019); *Women of Color Reprod. Justice Collective v. Kemp*, 472 F. Supp. 3d 1297 (N.D. Ga. 2020), *appeal filed*, No. 20-13024 (11th Cir. Aug. 11, 2020). Idaho - H.B. 366, 66th Leg. Reg. Sess. (Idaho 2021) <https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2021/legislation/H0366.pdf>. The Idaho law contains a trigger mechanism putting it into effect 30 days after a federal appeals court upholds similar legislation in another state. Iowa - Iowa Code § 146C.2; *see Planned Parenthood of the Heartland, Inc. v. Reynolds*, No. EQCE83074, 2019 WL 312072 at *5 (Iowa Dist. Jan. 22, 2019). Kentucky - Ky. Rev. Stat. § 311.770; *EMW Women’s Surg. Ctr. v. Beshear*, No. 3:19-cv-178-DJH, 2019 WL 1233575, at *2 (W.D. Ky. Mar. 27, 2019). Louisiana - S.B. 184, 45th Gen. Assemb., Reg. Session (La. 2019) (enacted “heartbeat” ban that would have become effective had the Fifth Circuit upheld Mississippi’s ban). Ohio - OHIO REV. CODE ANN. § 2919.195(A); *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796, 804 (S.D. Ohio 2019). Oklahoma - H.B. 2441 of 2021, to be codified at OKLA. STAT. tit. 63, § 1-731.3 et seq. (prohibiting abortion upon detection of a “heartbeat” except in cases of life endangerment or “serious risk of substantial and irreversible physical impairment of a major bodily function, not including psychological or emotional conditions”). The ban becomes effective on November 1, 2021; *Oklahoma Call for Reproductive Justice et al. v. O’Connor et al.*, No. CV-2021-2072 (D. Ct. Okla. Cnty. Oct. 4, 2021). Mississippi - MISS. CODE ANN. § 41-41-34; *Jackson Women’s Health Org. v. Dobbs*, 951 F.3d 246 (5th Cir. 2020) (affirming preliminary injunction of Mississippi’s 6-week ban), *cert. granted*, No. 19-1392 (U.S. May 17, 2021). Missouri - Mo. Rev. Stat. §§ 188.056; *Reproductive Health Services of Planned Parenthood of the St. Louis Region, Inc. et al. v. Parson*, No. 2:19-cv-4155-HFS (W.D. Mo. Aug. 27, 2019). North Dakota - N.D. CENT. CODE § 14–02.1-05.2; *MKB Mgmt. Corp. v. Burdick*, 16 F. Supp. 3d 1059 (D.N.D. 2014), *aff’d sub nom. MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768 (8th Cir. 2015). South Carolina - The South Carolina Fetal Heartbeat and Protection from Abortion Act, S.1, R-2, Act. No 1 of 2021 (“S. 1” or “the Act”), § 3 (adding S.C. Code Ann. §§ 44-41-610 et seq.); *Planned Parenthood S. Atl. v. Wilson*, No. CV 3:21-00508-MGL, 2021 WL 1060123 (D.S.C. Mar. 19, 2021), *appeal docketed*, No. 21-1369 (4th Cir. Apr. 5, 2021) (granting preliminary injunction). Tennessee - TENN. CODE ANN. § 39-15-216; *Memphis Ctr. for Reprod. Health v. Slatery*, 2020 WL 4274198 (M.D. Tenn. July 24, 2020). Texas - Tex. Health & Safety Code § 171.204-12.

On May 19, 2021, Texas Governor Greg Abbott signed Texas Senate Bill 8 (“S.B. 8”) into law. S.B. 8 bans abortion after approximately six weeks of pregnancy—only two weeks after a person with a regular menstrual cycle has a first missed period. At this stage, many people do not yet even know they are pregnant. This law is a patently unconstitutional attack on the abortion rights of Texans. It is a near-total ban on abortion, with only a single exception for a vaguely-defined “medical emergency.” There are no exceptions in cases of rape and incest.

The law deputizes and incentivizes private individuals to sue abortion providers and anyone helping a person obtain an abortion after six weeks of pregnancy; anyone who successfully sues another person or provider will be entitled to a monetary penalty of at least \$10,000. This ban is an attempt to force all health centers that provide abortions in the state to close by saddling them with lawsuits that consume their time and resources, and to isolate pregnant people seeking abortions in Texas from their communities and critical support networks.

The law also attempts to circumvent the courts and evade judicial review by encouraging private citizens to enforce the law for them. U.S. Attorney General Merrick Garland called the ban a “scheme to nullify the Constitution.”¹³

As a result, abortion care is effectively unavailable to the large number of Texas patients who cannot overcome the logistical and financial obstacles of traveling out of state to receive care. Like all abortion bans and restrictions, the tremendous burdens this law imposes fall hardest on Black, Indigenous, and other people of color, people with disabilities, people in rural areas, young people, and those working to make ends meet, who already face discriminatory and systemic obstacles to accessing health care. Patients have been living in a state of panic, not knowing where or when they will be able to get abortion care.¹⁴

b. Despite ongoing litigation against this blatantly unconstitutional law, Texas S.B. 8 is currently in effect and imposing irreparable harm on Texans with each passing day.

Texas S. B. 8 was challenged in federal court by Texas abortion providers in July 2021 in *Whole Woman’s Health v. Jackson* and has since reached the Supreme Court twice. Plaintiffs first filed an emergency request for relief with the U.S. Supreme Court after litigation was prevented from moving forward in the lower courts. At midnight on September 1, 2021, without action from Supreme Court, S.B. 8 went into effect. Almost twenty-four hours later, the Supreme Court denied the emergency motion for relief, allowing the law to remain in effect and litigation to proceed before the Fifth Circuit Court of Appeals.

¹³ Nick Niedzwiedek & Josh Gerstein, *DOJ sues Texas over abortion law*, POLITICO (Sept. 9, 2021), <https://www.politico.com/news/2021/09/09/doj-announces-lawsuit-over-texas-abortion-law-510921>.

¹⁴ See, e.g., Katherine Dautrich et al., *Texas abortion ban is an early glimpse of what post-Roe America would look like for women*, CNN.COM (updated Oct. 22, 2021) <https://www.cnn.com/2021/10/22/us/texas-abortion-ban-invs/index.html>; Iris Samuels, *New Texas abortion law pushes women to out-of-state clinics*, ASSOCIATED PRESS (Sept. 2, 2021) <https://apnews.com/article/abortion-lifestyle-health-travel-texas-fbc505c3db4a08af51ba409a91ea161c>.

S.B. 8 was temporarily blocked after the Department of Justice (“DOJ”) filed a separate federal lawsuit on September 9, seeking to enjoin the law.¹⁵ A federal district court issued a preliminary injunction temporarily blocking S.B. 8 while the DOJ case continued, and for a brief time, abortion providers in Texas began resuming abortion care after 6 weeks. However, shortly after, the Fifth Circuit granted Texas’s emergency motion to stay the injunction. S.B. 8 was enjoined for just over 48 hours.

Abortion providers filed a petition for certiorari before judgment, asking the Supreme Court to expedite and consider their case without waiting for the Fifth Circuit to rule. The DOJ filed an application to lift the Fifth Circuit’s stay of the preliminary injunction, and suggested that the Court could treat the application as a petition for certiorari before judgment. On October 22, the Supreme Court announced that it would hear both cases—but deferred ruling on DOJ’s request to reinstate the preliminary injunction until it heard the cases on November 1. At the time of this writing, the law is still in effect.

In response, Justice Sonia Sotomayor wrote:

I cannot capture the totality of this harm in these pages. [...] [T]he State (empowered by this Court’s inaction) has so thoroughly chilled the exercise of the right recognized in *Roe* as to nearly suspend it within its borders and strain access to it in other States. The State’s gambit has worked. The impact is catastrophic.¹⁶

As Justice Sotomayor noted, S.B. 8 “is causing a ‘dismantling of the provider network’ across the State”.¹⁷ The law is intended to intimidate physicians and other clinic staff out of providing abortion care. If they continue to provide abortion care, they could face ruinous financial penalties, legal costs, and court orders shutting their doors.

According to new research, in the 30 days after S.B. 8 went into effect, the number of abortions in Texas fell by half.¹⁸ The researchers hypothesize that several factors enabled these patients to obtain care despite S.B. 8. These include temporary increases in financial donations after S.B. 8’s passage, patients willing to forgo work or school in order to obtain an abortion before they were no longer eligible, and quicker scheduling turnaround due to the decreased number of eligible patients under S.B. 8. The researchers conclude that the number of abortions provided in Texas may continue to decline the longer the law is in effect.¹⁹

Ten percent of the nation’s women of reproductive age live in Texas and are now unable to exercise their fundamental right to access abortion care.²⁰ This draconian law harms Texans every day,

¹⁵ Nick Niedzwiedek & Josh Gerstein, *DOJ sues Texas over abortion law*, POLITICO (Sept. 9, 2021), <https://www.politico.com/news/2021/09/09/doj-announces-lawsuit-over-texas-abortion-law-510921>.

¹⁶ *United States v. Texas*, slip op. at 6, No. 21A85 (U.S. Oct. 22, 2021) (Sotomayor, J., dissenting).

¹⁷ *Id.* at 4 (quoting *United States v. Texas*, No. 1:21-cv-00796-RP, 2021 WL 4593319 at *38 (W.D. Tex. Oct. 6, 2021)).

¹⁸ Kari White, Elsa Vizcarra, Lina Palomares et al., *Initial Impacts of Texas’ Senate Bill 8 on Abortions in Texas and at Out-of-State Facilities*, TEX. POLICY EVALUATION PROJECT (Oct. 2021), <http://sites.utexas.edu/txpep/files/2021/11/TxPEP-brief-SB8-inital-impact.pdf>.

¹⁹ *Id.*

²⁰ Elizabeth Nash et al., *Impact of Texas’ Abortion Ban: A 14-Fold Increase in Driving Distance to Get an Abortion*, GUTTMACHER INST. (updated Sept. 2021), <https://www.guttmacher.org/article/2021/08/impact-texas-abortion-ban-14-fold-increase-driving-distance-get-abortion>.

disproportionally impacting communities that already face discriminatory obstacles in health care, especially Black, Indigenous, and people of color, undocumented immigrants, those living on low incomes, and those in rural areas. Financial constraints, childcare needs, domestic violence, and immigration status can all prevent people from traveling out of state for health care. For example, people working to make ends meet are often forced to delay accessing abortion services because they need time to secure the funds, and increased transportation costs add an additional financial hurdle.

In Texas, due to decades of racist economic policies, the poverty rate for Black and Latinx women is disproportionately high, meaning they will be most impacted by this ban. Black and Hispanic Texans are more than twice as likely to live below the poverty line as white and Asian Texans.²¹ In Texas, 37% of female-headed households live in poverty.²² Texas prohibits coverage of abortion through its Medicaid program and in nearly all private insurance plans, and S.B. 8 bans anyone—from abortion funds to family members—from paying an abortion provider or providing reimbursement for a patient’s care after six weeks, forcing patients to bear the full out-of-pocket cost of their abortion.

c. As a result of S.B. 8, Texas patients are seeking abortion care in neighboring states in record numbers.

S.B. 8 has forced patients who have the means to seek abortion care outside of Texas. Many are traveling hundreds of miles to obtain care in neighboring states. Recent research estimates a 14-fold increase in the driving distance to the nearest abortion clinic—an average of 247 miles each way,²³ assuming that the nearest abortion clinic has appointments available. Oklahoma, Colorado, Kansas, Nevada and New Mexico are already absorbing an enormous influx of Texas abortion patients, and some patients have been forced to secure appointments as far away as Michigan, Florida, New York, and Washington.²⁴

These states have reported huge upticks in patients traveling from Texas, often overwhelming local clinics. For instance, an Oklahoma clinic reported that two-thirds of the phone calls they’ve received since S.B. 8 took effect are from Texas patients. Similarly, an Oklahoma provider reported a “staggering 646% increase of Texan patients per day,” occupying between 50% and 75% of capacity,²⁵ and clinics in Oklahoma have been “forced to delay patients’ abortions” for weeks “because of the volume of appointments needed.”²⁶ A Kansas clinic similarly reported that about half of its patients now come from Texas.²⁷ The District Court found that this “constant stream of Texas patients has created backlogs that in some places prevent residents from accessing

²¹ *Poverty in Texas: 4.1 Million Texans Live in Poverty*, CNTR. FOR PUBLIC POLICY PRIORITIES (Mar. 2019) https://everytexan.org/images/2019_Poverty_in_Texas.pdf.

²² *See Texas*, Nat’l Women’s Law Ctr., <https://nwlc.org/state/texas/#:~:text=Poverty,in%20Texas%20live%20in%20poverty> (last visited Nov. 3, 2021).

²³ Elizabeth Nash et al., *Impact of Texas’ Abortion Ban: A 14-Fold Increase in Driving Distance to Get an Abortion*, GUTTMACHER INST. (updated Sept. 2021) <https://www.guttmacher.org/article/2021/08/impact-texas-abortion-ban-14-fold-increase-driving-distance-get-abortion>.

²⁴ *United States v. Texas*, No. 1:21-cv-00796-RP, 2021 WL 4593319 at *42 n. 69 (W.D. Tex. Oct. 6, 2021).

²⁵ *Id.* at *43 (quoting Yap Decl., Dkt. 8-9 at 3).

²⁶ U.S. App. to Vacate Stay at 8, *United States v. Texas*, No. 21A85 (U.S. Oct. 18, 2021).

²⁷ *United States v. Texas*, No. 1:21-cv-00796-RP, 2021 WL 4593319 at *44 (W.D. Tex. Oct. 6, 2021).

abortion services in their own communities.”²⁸ According to recent research, Arkansas, Louisiana, New Mexico, and Oklahoma combined have only approximately half the number of abortion clinics as Texas, and provide about one-third the number of abortions per year.²⁹

Many neighboring states to Texas are also hostile to abortion rights and have passed a myriad of restrictions on abortion access, imposing additional barriers on patients who have made the trip from Texas to access their constitutional right to an abortion. For example, Oklahoma recently enacted three extreme abortion restrictions that would force over half of the abortion providers in Oklahoma to stop providing abortions, in addition to other extreme restrictions that would subject patients to significant delays in care.³⁰ These were temporarily enjoined by the Oklahoma Supreme Court last week while litigation proceeds.³¹

Texas S.B. 8’s success in evading judicial review so far has further emboldened other anti-abortion state legislatures to pass additional extreme abortion restrictions. Already, S.B. 8 has had a ripple effect across the country as other states consider how to use S.B. 8 as a model for tougher abortion restrictions. Just this week, Ohio introduced House Bill 480, legislation that imitates S.B. 8’s structure for circumventing judicial review and allowing private enforcement of a complete abortion ban.³² Similarly, Florida legislators have pre-filed a S.B. 8 “copycat” bill for the upcoming legislative session, and Arkansas, Indiana, Missouri, South Carolina, and South Dakota have suggested that they will follow suit.³³ Kentucky, Louisiana, Oklahoma, and more are expected to join them.³⁴

d. Beyond S.B. 8, Texas and a majority of states across the country already impermissibly burden abortion access.

In recent years, the stark increase in hostility towards abortion rights has demonstrated a willingness by anti-abortion politicians to do everything in their power to deny patients their constitutional right. Prior to the passage of Texas S.B. 8, abortion was already extremely difficult to access in Texas, where restrictions forced health centers to close, and patients faced countless hurdles, including:

- A 24-hour waiting period after state-mandated biased counseling, which forces patients to make two trips to the clinic and increases their financial burden³⁵;

²⁸ *Id.* at *45.

²⁹ Kari White, Elsa Vizcarra, Lina Palomares et al., *Initial Impacts of Texas’ Senate Bill 8 on Abortions in Texas and at Out-of-State Facilities*, TEX. POLICY EVALUATION PROJECT (October 2021) <http://sites.utexas.edu/txpep/files/2021/11/TxPEP-brief-SB8-initial-impact.pdf>.

³⁰ *Lawsuit Seeks to Block Oklahoma’s New Abortion Bans and Restrictions*, CTR. FOR REPROD. RIGHTS (Sept. 2, 2021), <https://reproductiverights.org/oklahoma-abortion-bans-lawsuit/>.

³¹ *Oklahoma Call for Reproductive Justice et al. v. O’Connor et al.*, No. 119,918 (Okla. Sup. Ct. Oct. 25, 2021).

³² Ohio House Bill 480, 134th General Assembly, Regular Session (2021-2022) (Introduced Nov. 2, 2021).

³³ See Caroline Kitchener, *Lawmakers are racing to mimic the Texas abortion law in their own states. They say the bills will fly through.*, THE LILY (Oct. 19, 2021), <https://www.thelily.com/lawmakers-are-racing-to-mimic-the-texas-abortion-law-in-their-own-states-they-say-the-bills-will-fly-through/>; see also Meryl Kornfield, Caroline Anders, & Audra Heinrichs, *Texas created a blueprint for abortion restrictions. Republican-controlled states may follow suit*, THE WASH. POST (Sept. 3, 2021), <https://www.washingtonpost.com/nation/2021/09/03/texas-abortion-ban-states/>.

³⁴ *Id.*

³⁵ TEX. HEALTH & SAFETY CODE § 171.011; *id.* § 171.012.

- Bans on insurance coverage for abortion procedures³⁶;
- A ban on the use of telemedicine for abortion,³⁷ and;
- Parental consent requirement for young people in Texas.³⁸

Although S.B. 8 already banned abortion care after six weeks in Texas, the state nonetheless passed a new abortion restriction, and another has gone into effect. In August 2021, the Fifth Circuit Court of Appeals became the first federal court in the country to uphold a ban on the standard method of abortion after approximately 15 weeks of pregnancy.³⁹ In its special session in September, Texas also passed a ban on medication abortion after seven weeks—contrary to FDA guidelines for use—which is set to go into effect on December 2, 2021.⁴⁰ Together, these laws will broadly curtail abortion care across the state even if S.B. 8 is rightly enjoined.

Even without the threat of S.B. 8-related bills, we are living in a time of unprecedented hostility towards abortion rights. Texas is not the only state waging a multi-pronged attack on abortion rights to push access out of reach for its citizens. For the past decade, anti-abortion state lawmakers have enacted a coordinated and unrelenting wave of restrictions on abortion access, creating a cumulative undue burden that makes abortion extremely difficult, and sometimes impossible, to access in certain states or even entire regions of the United States, even while *Roe* is still the law of the land. For example, Texas’s neighbor Oklahoma:⁴¹

- bans abortions past 20 weeks of gestation⁴²;
- bans D&E abortions, the most commonly used abortion procedure in the second trimester (temporarily enjoined)⁴³;
- bans abortions via telemedicine⁴⁴;
- criminalizes self-managed abortions⁴⁵;
- aims to force clinics to close through targeted regulation of abortion providers, including facility requirements, and admitting privileges requirements (admitting privileges requirements permanently enjoined)⁴⁶;
- imposes biased counseling requirements⁴⁷;
- requires parental notification and consent requirements for minors seeking an abortion⁴⁸; and

³⁶ TEX. ADMIN. CODE § 354.1167; TEX. INS. CODE § 1218.003; id. § 1218.004.

³⁷ TEX. HEALTH & SAFETY CODE § 171.063.

³⁸ TEX. FAM. CODE § 33.0021; TEX. OCC. CODE § 164.052.

³⁹ *Whole Woman’s Health v. Paxton*, 10 F.4th 430 (5th Cir. 2021).

⁴⁰ S.B. 4, 87th Leg., 2nd Spec. Sess. (Tex. 2021).

⁴¹ “*What if Roe Fell?*”, CTR. FOR REPROD. RIGHTS, <https://maps.reproductiverights.org/what-if-roe-fell?state=OK> (last visited Nov. 2, 2021).

⁴² OKLA. STAT. tit. 63, § 1-745.5.

⁴³ OKLA. STAT. tit. 63 § 1-737.9 (A); This law is currently temporarily enjoined. See *Tulsa Women’s Reproductive Clinic, LLC v. Hunter*, No. CV-2015-1838 (Okla. Nov. 6, 2019)

⁴⁴ OKLA. STAT. ANN. tit. 63, § 1-729.1; S.B. 779 of 2021 (“S.B. 779”), to be codified at OKLA. STAT. tit. 63, § 1-757.1 et seq.

⁴⁵ OKLA. STAT. tit. 63, § 1-733; see also OKLA. STAT. tit. 21, § 862.

⁴⁶ OKLA. ADMIN. CODE § 310:600-1-1 et seq.

⁴⁷ OKLA. STAT. tit. 63, § 1-738.2 (B); *Nova Health Sys. v. Pruitt*, 2012 OK 103, 292 P.3d 28, as corrected (Okla. 2012) (Oklahoma’s ultrasound requirement is permanently enjoined by court order.).

⁴⁸ OKLA. STAT. tit. 63, § 1-740.2(B)(1); *Id.* § 1-740.2(B)(3).

- imposes a mandatory 72-hour waiting period before a patient can obtain an abortion.⁴⁹

Oklahoma also recently passed five extreme abortion restrictions that were all set to take effect on November 1. All five have been temporarily enjoined while litigation proceeds.⁵⁰ These laws include⁵¹:

- A law that arbitrarily disqualifies highly trained health care providers like board-certified family medicine doctors from providing abortion because they are not board-certified OB/GYNs⁵²;
- Two laws that contain a host of restrictions on medication abortion, including an admitting privileges requirement similar to requirements struck down by the U.S. Supreme Court and the Oklahoma Supreme Court⁵³;
- An ultrasound requirement more restrictive than an ultrasound law already struck down by the Oklahoma Supreme Court⁵⁴;
- A total abortion ban, which suspends the licenses of physicians who provide abortion care⁵⁵; and
- A law banning abortion as early as approximately six weeks into pregnancy, before many people even know they are pregnant.⁵⁶

Similarly, neighboring Arkansas' laws:⁵⁷

- generally prohibit abortion at twelve weeks⁵⁸ (permanently enjoined) and 18 weeks after the last menstrual period⁵⁹ (temporarily enjoined);
- prohibit abortion twenty weeks post-fertilization⁶⁰;
- prohibit abortion after viability⁶¹;
- prohibit certain methods of abortion⁶²;
- ban all abortions (temporarily enjoined)⁶³;

⁴⁹ OKLA. STAT. tit. 63, § 1-738.2 (B).

⁵⁰ See *Oklahoma Call for Reproductive Justice et al. v. O'Connor et al.*, No. 119,918 (Okla. Oct. 25, 2021).

⁵¹ See *Lawsuit Seeks to Block Oklahoma's New Abortion Bans and Restrictions*, CTR. FOR REPROD. RIGHTS (Sept. 2, 2021), <https://reproductiverights.org/oklahoma-abortion-bans-lawsuit/>.

⁵² H.B. 1904, 2021 Okla. Sess. Law Serv. Ch. 211.

⁵³ S.B. 778, 2021 Okla. Sess. Law Serv. Ch. 577.

⁵⁴ S.B. 779, 2021 Okla. Sess. Law Serv. Ch. 578.

⁵⁵ H.B. 1102, 2021 Okla. Sess. Law Serv. Ch. 205.

⁵⁶ H.B. 2441, 2021 Okla. Sess. Law Serv. Ch. 219

⁵⁷ "What if Roe Fell?", CTR. FOR REPROD. RIGHTS, <https://maps.reproductiverights.org/state/arkansas> (last visited Nov. 2, 2021).

⁵⁸ ARK. CODE ANN. § 20-16-1304; The law is permanently enjoined. See *Edwards v. Beck*, 8 F. Supp. 3d 1091 (E.D. Ark. 2014), aff'd, 786 F.3d 1113 (8th Cir. 2015).

⁵⁹ ARK. CODE ANN. § 20-16-2002(b); The law is temporarily enjoined. See *Little Rock Family Planning Servs. v. Rutledge*, 984 F.3d 682 (8th Cir. 2021).

⁶⁰ ARK. CODE ANN. § 20-16-1405,

⁶¹ ARK. CODE ANN. § 0-16-705 (a).

⁶² ARK. CODE ANN. § 20-16-1203; id. § 20-16-1803; The D&E ban is currently blocked by a preliminary injunction. See *Hopkins v. Jegley*, 2021 WL 41927 (E.D. Ark., 2021).

⁶³ ARK. CODE ANN. § 5-61-404; This total ban is temporarily enjoined. See *Little Rock Fam. Plan. Servs. v. Jegley*, No. 4:21-CV-00453-KGB, 2021 WL 3073849 (E.D. Ark. July 20, 2021).

- ban abortions sought for sex selection and Down syndrome⁶⁴;
- require a mandatory seventy-two-hour waiting period⁶⁵;
- require biased counseling⁶⁶;
- require an ultrasound before obtaining an abortion⁶⁷;
- limit public funding for abortions⁶⁸ as well as insurance coverage of abortion care under the state’s health-care exchange⁶⁹;
- require that a parent, legal guardian, or judge consent to a minor’s abortion⁷⁰;
- aim to force clinics to close through targeted regulation of abortion providers, including facility requirements⁷¹ and admitting privileges requirements⁷²;
- restrict the provision of abortion care to licensed physicians⁷³;
- prohibit telemedicine for the provision of abortion care.⁷⁴

These are not isolated instances. Anti-abortion state lawmakers have been trying for years to present a case to the Supreme Court that could overturn *Roe v. Wade*. That case is now being presented to the Court in *Dobbs v. Jackson Women’s Health Organization*. In *Jackson Women’s Health Organization*, Mississippi brazenly asks the Supreme Court to overturn decades of precedent and overturn *Roe*. This would lay the groundwork for states to take steps towards outlawing abortion entirely. Twelve states have already passed “trigger” bans designed to ban abortion immediately if the Court overturns *Roe*.⁷⁵

Recent research concluded that if the U.S. Supreme Court were to weaken or overturn *Roe v. Wade*, a total of 26 states would be certain or likely to ban abortion.⁷⁶ Abortion rights would be protected in less than half of the U.S. states and none of the U.S. territories.⁷⁷ Assuming that all 26 states ban all or most abortions, overturning *Roe* would create entire regions of the United States where abortion is banned outright, dramatically increasing the distance patients would need to travel in

⁶⁴ ARK. CODE ANN. §§ 20-16-1904, 20-16-2103; Both provisions are currently enjoined. See *Hopkins v. Jegley*, No. 4:17-CV-00404-KGB, 2021 WL 41927 (E.D. Ark. Jan. 5, 2021); *Little Rock Family Planning Servs.*, 984 F.3d 682 (8th Cir. 2021).

⁶⁵ ARK. CODE ANN. § 20-16-1703(b)(1).

⁶⁶ ARK. CODE ANN. §§ 20-16-1703(b)(2), 20-16-2403 (a)-(b).

⁶⁷ ARK. CODE ANN. §§ 20-16-1703(e), 20-16-1303, 20-16-602(c)(2)

⁶⁸ ARK. CONST. AMEND. 68, § 1; In *Hodges v. Huckabee*, the Arkansas Supreme Court held that the state “cannot stand as a bar to the payment of Medicaid funds for abortions necessary as the result of rape or incest so long as the Hyde Amendment as written remains in effect.” 338 Ark. 454, 462, 995 S.W.2d 341, 347 (Ark. 1999). Therefore, Amendment 68 is enforced to the limit of federal law.

⁶⁹ ARK. CODE ANN. § 23-79-156.

⁷⁰ ARK. CODE ANN. §§ 20-16-804, 20-16-809.

⁷¹ ARK. CODE ANN. § 20-9-302; Ark. Admin. Code 007.05.2-8, 007.05.2-12.

⁷² ARK. CODE ANN. §§ 20-16-1504(d), 20-19-312. ARK. ADMIN. CODE 007.05.2-8. The Supreme Court denied certiorari, allowing a “contract physician” admitting privileges requirement to go into effect. See *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 138 S. Ct. 2573 (2018)

⁷³ ARK. CODE ANN. § 5-61-101.

⁷⁴ ARK. CODE ANN. §§ 20-16-603, 20-16-1504, 20-16-1703.

⁷⁵ “What if *Roe Fell?*”, CTR. FOR REPROD. RIGHTS, <https://maps.reproductiverights.org/what-if-roe-fell> (Nov. 2, 2021).

⁷⁶ *If *Roe v. Wade Falls*: Travel Distance for People Seeking Abortion*, GUTTMACHER INST., <https://states.guttmacher.org/> (last visited Nov. 2, 2021).

⁷⁷ “What if *Roe Fell?*”, CTR. FOR REPROD. RIGHTS, <https://maps.reproductiverights.org/what-if-roe-fell> (Nov. 2, 2021).

order to access care. According to the report, if all 26 states ban abortion, the median distance Texans would need to travel to access the nearest abortion clinic would increase to 542 miles.⁷⁸ This number does not account for additional scenarios impacting their access, including the possibility that the nearest clinics may not have appointments available or may not provide the type of abortion care they need.

III. Conclusion.

Today, the ability to access abortion care depends on where you live. There are large parts of the country where it is extraordinarily difficult, and in some cases virtually impossible, to access abortion services. For pregnant people in these parts of the country, the constitutional right to abortion is merely theoretical. And when individuals lack access to abortion services, they are harmed. As Justice Sotomayor wrote: “By delaying any remedy, the Court enables continued and irreparable harm to women seeking abortion care and providers of such care in Texas—exactly as S. B. 8’s architects intended. [...] Every day the Court fails to grant relief is devastating, both for individual women and for our constitutional system as a whole.”⁷⁹

The Center for Reproductive Rights, and other litigating organizations such as the American Civil Liberties Union (ACLU) and Planned Parenthood Federation of America, are fighting to protect abortion rights from constitutional challenges across the country. But abortion is facing a crisis on multiple fronts. S.B. 8 only exacerbated an already existing crisis in abortion access in Texas and neighboring, hostile states, where the constitutional right to an abortion is rapidly becoming, or already is, a right in name only. That is especially true for Black, Indigenous and People of Color, rural residents living far from an abortion clinic, people working to make ends meet, people with disabilities, and other populations that experience frequent discrimination in the healthcare system.

Regardless of what the Supreme Court does in *United States v. Texas* and *Whole Woman’s Health v. Jackson*, the damage has been incalculable. Already, pregnant people in Texas have been denied their constitutional right to abortion for over two months, and other states are gearing up to follow suit. In her dissent, Justice Sotomayor noted: “S. B. 8 was created to frustrate [the constitutional right to seek abortion care] by raising seemingly novel procedural issues, and it has had precisely the intended effect. ... Every day that S. B. 8 remains in effect is a day in which such tactics are rewarded. And every day the scheme succeeds increases the likelihood that it will be adapted to attack other federal constitutional rights.”

This multi-pronged crisis requires a swift response from both Congress and the courts. When our constitutionally protected liberties are under sustained attack, Congress has a responsibility to enact legislation to safeguard those rights. We need Congress to act now—because the crisis is now. We applaud the House of Representatives for two historic votes to advance reproductive rights this session: passing the Women’s Health Protection Act and passing an appropriations bill free of the Hyde Amendment and related restrictions on coverage of abortion care. The Women’s Health Protection Act would protect the provision of and access to essential reproductive health care and the constitutional rights of all people to access abortion, no matter where they happen to live. An appropriations bill free of the Hyde amendment would ensure that the government no

⁷⁸ *Id.*

⁷⁹ *United States v. Texas*, slip op. at 2, No. 21A85 (U.S. Oct. 22, 2021) (Sotomayor, J., dissenting).

longer denies coverage of abortion care under Medicaid and pushes that care out of reach for people who are struggling financially—people who are more likely to be women of color, young, immigrants, and members of the LGBTQ+ community. Both bills are now in the hands of the Senate. At this key moment, as pregnant people across Texas—and beyond—remain unable to access to their constitutionally protected right to access abortion, all steps must be taken to support abortion access for all who need it.