

United States: Texas abortion ban upheld

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A Texas law that bans 90% of abortions was upheld by the United States Supreme Court in a late-night ruling on September 1.

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The five to four decision upholding the most restrictive anti-abortion law in the country was made without actually reviewing it.

The court did this under a procedure known as a “shadow docket”, which allows it to bypass hearing arguments and written opinions on the law, in contrast to normal process.

In recent months, the court has used this process to: strike down COVID-19 restrictions on religious gatherings in private homes; force president Joe Biden to abide by former president Donald Trump’s “remain in Mexico” policy for asylum seekers from Central America; and block the extension of an emergency federal ban on evictions of tenants.

In her dissenting opinion, Justice Sonia Sotomayor said: “Presented with an application to enjoin a flagrantly unconstitutional law, engineered to prohibit women from exercising their constitutional rights and evade judicial review, a majority of Justices have opted to bury their hands in the sand.

“Last night, the court silently acquiesced in a State’s enactment of a law that flouts nearly 50 years of federal precedents. Today, the court belatedly explains that it declined to grant relief because of procedural complexities of the State’s own invention.”

The law now in effect in Texas bans all abortions after six weeks of pregnancy. Many women and pregnant persons do not even know they are pregnant by then. There are no exceptions for rape or incest. The only health exceptions are if the pregnancy endangers the woman’s life or would lead to “substantial and irreversible impairment of a major bodily function”.

– Roe versus Wade

The US Supreme Court currently has a majority of six to three justices that are opposed to the 1973 court ruling known as *Roe vs Wade* that legalized abortion. The *Roe vs Wade* decision was made against a backdrop of pressure from a mass women’s rights movement that was mobilizing against the criminalization of abortion at the time.

Three of those reactionary justices were appointed by Trump, who said even before his election that

he would only appoint justices who opposed “Roe” to the court.

Chief Justice John Roberts sided with the three members who support a woman’s right to abortion, not on the merits of the case, but because of the procedure used by the court.

Roberts is outspoken in his view that *Roe vs Wade* should be overturned. The Texas law is another step toward the court overturning women’s right to abortion, when and if *Roe vs Wade* comes before it.

‘Vigilante’ justice

The “procedural complexities” of the new Texas law include how it will be enforced. Enforcement is prohibited by the state of Texas and instead left up to a so-called “private right of action” — effectively enabling vigilante justice and bounty hunters.

The law allows a private citizen, within or outside the state, to file a lawsuit against any person in Texas who aids a woman in any fashion to get an abortion after six weeks.

While the person seeking an abortion cannot be sued, doctors and other employees at clinics that perform abortions can be. Anyone who drives a woman to a clinic for an abortion (including drivers for ride-share services), or helps a woman financially or in any other way to obtain an abortion can be sued.

If a lawsuit is successful, the person or clinic worker sued is liable for up to \$10,000 (the “bounty”) plus legal fees, payable to the plaintiff. There is no financial risk in bringing a suit forward, because, if it fails, the victim of the lawsuit receives nothing.

The immediate impact of the decision was that the dwindling number of abortion clinics in Texas immediately stopped providing abortions after six weeks of pregnancy.

This has had a chilling effect on women who are less than six weeks into pregnancy and who want or need an abortion.

Lives at risk

The net result is that abortions for the great majority of Texan women are now unavailable in the state. There are now only two options for a person seeking an abortion: dangerous “backyard” procedures or traveling to states without such restrictions.

Regarding the latter, many neighboring states also have onerous restrictions that make this difficult or prohibitive. The best option is California.

Among the state’s poorest people, Black and Latina women would find the financial hurdles and difficulties getting time off work or away from their families to make the trip interstate insurmountable.

Before the Supreme Court upheld the Texas law, it was widely believed that the bizarre application of vigilante justice without state action would be enough to strike the law down.

However, the decision, based on the law’s “complicated procedure” of enforcement, said that

because the Texas state is not involved in enforcement, there was no issue before the court.

This raises the question as to how the reactionary Republican lawmakers in Texas knew that adopting their weird vigilante enforcement requirements would be used by the court's majority to uphold the law in its entirety?

The answer partly lies in the fact that the Texas' abortion law follows a model first used in the city of Waskom (on the border between Texas and Louisiana) to ban abortion within its boundaries in 2019.

According to Associated Press, "Right to Life East Texas director Mark Lee Dickson, 36, a Southern Baptist minister, championed Waskom's abortion ban. Through his state senator, Bryan Hughes, he met Jonathan F Mitchell, a former top lawyer for the state of Texas. Mitchell became his attorney and advised him on crafting the ordinance, Dickson said in an interview.

Mitchell served as "a law clerk to the late conservative Supreme Court Justice Antonin Scalia", according to AP and "went on to serve as Texas solicitor general from 2010 to 2015".

According to AP, "A law review article Mitchell wrote that was published in 2018 gave guidance to lawmakers worried about courts blocking their laws. He said lawmakers could protect their legislation by including a private right of action. He said the strategy could apply to a wide range of laws such as campaign finance, gun control and abortion."

The Texas law is the worst of the laws passed to chip away at the right to abortion since Roe vs Wade. These attempts have gotten more blatant in recent years, and have been generally approved by the Supreme Court when legally challenged.

Mass response needed

In reaction to the shock decision, many women are speaking out in public and on social media against it and trying to figure out how to fight it.

Nancy Northrop, president and CEO of the Center for Reproductive Rights, told DemocracyNow! that the person suing someone who aids a woman seeking abortion doesn't even have to know them

"You can just be a person who every day goes outside a woman's clinic, yelling and screaming and trying to stop women from getting abortions..."

"At the Whole Woman's Health in Fort Worth [Texas], who is the lead plaintiff in this case [that was brought before the Supreme Court], when they were providing services right up to the deadline, there were anti-choice activists outside the clinic. When it got dark, they were shining their lights into the parking lot.

"And these are the people who now have the power to sue all over the state of Texas. It's absolutely an abomination."

In response to the decision, Biden's Attorney General has sued Texas, asking a judge to "protect the rights that Texas has violated" by declaring the law unconstitutional under long-standing Supreme Court precedent, and blocking its enforcement.

The day before Trump's inauguration in 2017, more than one million women and their supporters marched in cities and towns across the country in defense of women's rights — the first such actions in years. The actions were coordinated by a group called Women's March, and built rapidly over

social media.

In the wake of the Texas ban, Women's March has called for actions in the streets across the country in defense of women's reproductive rights for October 2. More than 90 groups have endorsed the call.

This could be the beginning of a mass movement to fight the court's ruling.

The Democrats will likely try to steer the movement into electoral support, and support for legal actions such as the attorney general's suit — which is likely to fail when it reaches the Supreme Court.

Mass action in the streets, independent of the two capitalist parties — like the Black Lives Matter actions of recent years — is the only effective way to fight.

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P.S.

- Edited version by Green Left Weekly.