

The Unfathomable Implications of the Texas Vigilante-Enforced Abortion Ban



Nathan Kasai
Senior Policy Counsel
[@Nathan_Kasai](https://twitter.com/Nathan_Kasai)



Lanae Erickson
Senior Vice President for the Social Policy & Politics Program
[@LanaeErickson](https://twitter.com/LanaeErickson)

Texas’s recently enacted six-week abortion ban is a blatant attack on the fundamental right to choose in this country. But in addition to the threat it poses to the rights of women in the state and across the country, it is also extreme in construction—not just in application. It is a bedrock principle of the American legal system that a person only has the right to pursue action in court if they are personally impacted by a law or action. Texas has upended that principle in a dangerous way, and now other states are threatening to create copycat laws to skirt judicial review.

Texas’s Law Sicks Bounty Hunters on Women and Doctors.

Normally, a person must be impacted by a law or action in order to have the right to sue in court. For example, if a person witnesses a car accident, he or she can’t sue either of the drivers, as the

witness isn't personally impacted by the accident. Similarly, when opponents of marriage for gay couples sued to try to block marriage equality in California, the Supreme Court said they could not, because while they may disapprove of the marriage for gay couples, the law didn't impact them. Simply opposing a law has never been enough to get you into the courtroom—you have to show how it personally affects you. Until now.

That's the other most absurd part of Texas's abortion ban. Not only does it ban abortion before most women would even know they are pregnant, but it also gives random unaffected people the right to sue and collect damages from abortion providers, women seeking abortions, or those who "aid or abet" a prohibited abortion. These bounty-hunters do not have to have any interest in or relationship to the people involved in the procedure. And it's already playing out exactly as would be expected. Two of the first plaintiffs to sue under the law don't even live in Texas. One, a self-described "disbarred and disgraced" lawyer with a history of tax evasion, lives in Arkansas. When asked about his motivation for filing the lawsuit, he said, "If this is a free-for-all, and it's \$10,000, I want my \$10,000. And yes, I do aim to collect." In their rush to create a near total ban on abortion, Texas opened the floodgates to legal grifters.

Nowhere else in American law is the enforcement of a law delegated out to individual citizens like this. Our laws are either enforced by elected officials or challenged by those who are actually impacted by them, not by arbitrary and unaffected persons. This enforcement would normally be in the realm of responsibility for Texas's attorney general or other state officials, but cynically, Texas Republicans know they can force law-abiding abortion providers into financial stress if private citizens can bring a deluge of bad faith claims against them. The goal is clearly to burden providers not just with the threat of paying damages to the vigilantes who sue, but to also saddle them with lawyer's fees in countless lawsuits.

Texas Knew What it was Doing. So did the Supreme Court.

Texas legislators knew exactly what they were doing when they wrote their novel law. They wanted to subvert oversight and undermine coequal branches of government, who in any regular circumstance would be tasked with enforcing the law or hearing these lawsuits. The law was intentionally designed to only be enforced through vigilante private lawsuits so that the state government could wash its hands of involvement and evade judicial review. Because lawsuits challenging laws or government action on constitutional grounds are normally brought against the specific officials enforcing the law, the vigilante system is a cynical ploy to make it more difficult to challenge the law despite its blatant unconstitutionality. If state officials are explicitly barred from ensuring the law is enforced, who do opponents or those impacted sue? The bounty hunters who are suing providers? They have no power to repeal the law or stop others from taking their place. The state government? They are claiming they aren't involved. It's nothing less than an end run around our legal system.

But as unprecedented as Texas's law is, so too was the Supreme Court's decision to go along with the scheme, with full understanding of the stark implications. When a law is challenged for being unconstitutional or for contradicting existing Supreme Court precedent, the challenging parties will almost always ask for the law to be temporarily blocked from being enforced while the lawsuit is going on. This airs on the side of caution that a potentially unconstitutional law isn't in place and impacting the lives of Americans during the lengthy process of getting through the district court and appeals process. *Even in cases where the Court has eventually reversed their existing precedents*, they have blocked enforcement of controversial laws until the case is fully decided. The Court didn't do that here, in an illogical move issued in the dead of night. Without explanation, the conservative majority on the Court put out an unsigned order allowing the law to go into effect.

The Court's own precedent under *Roe v. Wade* and the cases that have followed say that a state cannot restrict the right to abortion services prior to the time when a fetus is viable outside the womb. Texas's law bans them at six weeks, when no fetus is anywhere near viability and many women don't even know they are pregnant. This is as clear a brazen violation of the rights laid out by *Roe* as it gets. And for the Court to allow the law to go into effect is likely an omen of worse things to come.

Conclusion

Texas's law is a new frontier in attacks against the right to choose in this country. There are good faith concerns held by many Americans when it comes to abortion, and there are policy approaches that reduce the need for abortion without trampling the rights of women. The Texas law achieves neither. For this reason, wide swaths of voters across the country are lining up in opposition. In a recent poll, 70% said Texas's law is the wrong approach. And even more, 81%, said that granting a \$10,000 bounty to the private citizens who bring these lawsuits is wrong. Even Republican voters disagree with the law in large numbers, with just 46% supporting it. Texas is firing a clear shot across the bow of *Roe*. And its novel end run around judicial review will likely be copied by countless states and interests in the decades to come.

TOPICS

ABORTION/CONTRACEPTION 59