

# CENTER *for* REPRODUCTIVE RIGHTS

## WHOLE WOMAN'S HEALTH V. PAXTON

On January 21, 2021, the Fifth Circuit Court of Appeals will rehear oral arguments in *Whole Woman's Health v. Paxton*. The case involves a Texas law (SB 8) that bans [D&E \(dilation and evacuation\)](#), the standard abortion procedure used after approximately 15 weeks of pregnancy. The ban is being challenged by the Center for Reproductive Rights on behalf of lead plaintiff Whole Woman's Health, which operates three health clinics in the state of Texas. Several other abortion providers, including Planned Parenthood, are also plaintiffs in the lawsuit.

In October 2020, a panel of three judges on the Fifth Circuit ruled that the D&E ban was unconstitutional. However, in a rare and unusual move, the Court of Appeals then vacated its own panel's decision without prompting, and has decided to rehear the case *en banc*, meaning it will be heard anew by all the judges of the Fifth Circuit.

### What is SB 8?

- This ban on D&E is part of SB 8-- a sweeping anti-abortion bill passed by the Texas legislature in 2017. It would make it a crime for a doctor to perform a D&E, with only a narrow exception for women facing immediate, serious medical risks. Doctors who violate the ban would face up to two years in prison.
- SB 8 prevents doctors from using their best medical judgment and from providing the best care available. In no other area of medicine would politicians consider creating a legal barrier to a standard and safe procedure.
- SB 8 does nothing to improve the lives of Texans or protect pregnant people, and actually threatens public health and safety by criminalizing doctors for using their medical judgment.
- Banning one abortion method after another is a tactic used by politicians across the country in their ongoing attempt to ban abortion entirely.

### What is D&E and when is it used?

- D&E is the standard abortion procedure used after approximately 14 or 15 weeks of pregnancy.
- It is not always possible for someone to receive abortion care as soon as they would like. Many things can stand in their way, from not being able to afford it, to travel distance to a clinic, to barriers put in place by politicians, such as parental consent laws or bans on insurance coverage for abortion. In many states, there are very few abortion clinics remaining, creating weeks-long wait lists for people to obtain an appointment.
- The COVID-19 pandemic is causing further barriers and delays for abortion patients, pushing patients further into pregnancy. In early 2020, Texas officials exploited the pandemic to impose a complete ban on abortion for approximately one month. Even after abortion became accessible again, there were backlogs of patients at clinics throughout the state.
- People of color, low-income people and those living in rural areas will suffer the most from this ban because they already face significant hurdles to accessing abortion.

- Nationally, 75% of abortion patients are low-income, and 49% of patients live below the federal poverty level.
- More than 60% of abortion patients are people of color.
- People in rural areas of Texas often must travel for hours to reach the nearest clinic. For example, a person in Corpus Christi would need to drive over 150 miles to reach an abortion clinic.

### **Where else have D&E bans been passed?**

- Similar bans passed in other states have been blocked from taking effect or are not being fully enforced, including in Alabama, Arkansas, Indiana, Kansas, Kentucky, Louisiana, Ohio, and Oklahoma.
- A federal court has never upheld a D&E ban.
- In 2019, a state court in Oklahoma became the first court to [uphold](#) such a ban in full, but the ruling was appealed by the Center for Reproductive Rights and the law remains blocked pending a decision from the state’s Supreme Court.

### **What are the legal implications of this case?**

- This law contradicts decades of legal precedent. The U.S. Supreme Court has held repeatedly that laws creating obstacles to abortion access without any countervailing benefit are unconstitutional.
- In *Stenberg v. Carhart* (2000), the Supreme Court ruled that states cannot ban D&E. Last year, the Supreme Court declined to review a lower court decision striking down a D&E ban in Alabama.
- Several Texas physicians testified at trial that they would stop providing abortion care altogether if this law takes effect, so it is inevitable that some patients would be denied abortion care.
- Combined with the existing abortion restrictions in Texas, a D&E ban would be devastating for abortion access in the state. Texas already has a slew of other laws on the books that make it harder for patients to access abortion, including: state-mandated biased counseling; a law forcing patients to make two trips to a clinic at least 24 hours apart before they can have an abortion; a ban on the use of telemedicine to provide medication abortion; a parental consent and notification law; and many more.
- Half the abortion clinics in Texas were already shut down by a devastating state abortion restriction that the Supreme Court struck down in 2016. Most never reopened—the effects are still felt today. (*Whole Woman’s Health v. Hellerstedt*).
- As of 2017, some [96% of Texas counties](#) had no clinics that provided abortions.
- This attack is not slowing down: Texas lawmakers are already planning to introduce at least ten more abortion restrictions this coming session, including a total abortion ban.

### **How do medical experts feel about D&E bans?**

- Major medical organizations including the AMA and American College of Obstetricians and Gynecologists (ACOG) strongly [oppose](#) these types of abortion bans, noting, “These restrictions represent legislative interference at its worst: doctors will be forced, by ill-advised, unscientifically motivated policy, to provide lesser care to patients. This is unacceptable.”

- Doctors say bans on abortion procedures can increase risks for patients and that they must be able to use their best medical judgment when providing medical care and not have politicians dictate the care that they provide.

### **Case History**

- May 26, 2017: Texas Legislature passes SB8
- June 6, 2017: SB8 signed into law
- July 20, 2017: Lawsuit filed
- August 31, 2017: Texas District Court grants temporary restraining order
- November 2-8, 2017: Trial
- November 22, 2017: Texas District Court strikes down law as unconstitutional
- November 22, 2017: State appeals
- November 5, 2018: Oral arguments at Fifth Circuit
- March 13, 2019: Fifth Circuit puts decision on hold pending a SCOTUS ruling in *June Medical v. Russo*
- October 13, 2020: Three-judge panel at the Fifth Circuit affirms the law is unconstitutional
- October 30, 2020: Without even waiting for Texas to ask, the Fifth Circuit vacates the panel decision and announces it will re-hear the case *en banc*
- January 21, 2020: Oral arguments will be held before the entire *en banc* Fifth Circuit

**For an interview with the lead attorney on the case, Molly Duane of the Center for Reproductive Rights, please contact Kelly Krause at [kkrause@reprorights.org](mailto:kkrause@reprorights.org) or (585) 919-3649.**