Justices' Texas Abortion Ruling Is Murky On Key Question

By **Ilya Somin** (January 7, 2022)

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Last month, the U.S. Supreme Court issued an extremely important, but frustratingly murky, decision in Whole Woman's Health v. Jackson,[1] the case addressing S.B. 8, Texas' controversial new anti-abortion law.

The key issue at stake in this case is whether Texas can evade judicial review by limiting enforcement authority exclusively to private parties.

S.B. 8 seemingly bars enforcement by state officials, and instead delegates it to private litigants, who each stand to gain $10,000 or more in damages every time they prevail in a lawsuit against anyone who violates the law's provisions barring abortions after a fetal heartbeat is detected, usually around six weeks into a pregnancy.

If Texas' ploy succeeds, it would set a dangerous precedent for insulating attacks on other constitutional rights from judicial review. For this reason, the struggle over S.B. 8 has implications that go far beyond abortion rights.

It should trouble even those who believe that the Supreme Court's 1973 decision in Roe v. Wade and later decisions protecting abortion should be overruled or severely limited, as might happen in Dobbs v. Jackson Woman's Health Organization,[2] a case currently before the justices.

Unfortunately, the Supreme Court's decision is vague on the question of whether the S.B. 8 strategy will be successful or not. Only further litigation is likely to clarify the picture. In the meantime, other states have already begun trying to imitate the S.B. 8 strategy.

The purpose of S.B. 8's unusual bounty hunter structure is to insulate the law from judicial review by barring preenforcement lawsuits seeking to prevent its implementation.

The state government's position is that abortion providers cannot resort to such lawsuits because there are no state officials responsible for the law's enforcement. And they cannot sue potential private litigants unless and until the latter have decided to file a lawsuit seeking to enforce the law.

Since S.B. 8 was enacted in August, abortions in most of Texas have plummeted[3] because of the chilling effect created by the fear of liability from S.B. 8 lawsuits.

The Supreme Court's December decision barred several possible ways for providers to challenge S.B. 8, but left open others. It blocked lawsuits against the attorney general of Texas, state judges, state court clerks and the one private litigant who was a defendant in the case.

The plurality opinion by Justice Neil Gorsuch, joined by three other conservative justices — Justices Amy Coney Barrett, Brett Kavanaugh and Samuel Alito — concludes that relief against the AG is impermissible because of state sovereign immunity, and relief against the clerks is not allowed because the latter's interests are not genuinely adverse to those of the abortion providers challenging S.B. 8.

Gorsuch contended that state court judges and clerks are not adverse to abortion providers, because the job of the former is merely to impartially consider cases, not support one side or the other.

On the other hand, Gorsuch concluded that the plaintiffs can bring a preenforcement action against state medical licensing officials. On this issue, eight of nine justices agreed with him — all but Justice Clarence Thomas.

Gorsuch reasoned that these licensing officials can be sued because they are indirectly tasked with enforcing S.B. 8 and other parts of Texas' Health and Safety Code by denying license applications and renewals to medical professionals who violate the law.

If the plaintiffs prevail in their lawsuit against the licensing officials, they will most likely be able to get an injunction that applies only against those defendants. But the precedent set can then potentially be used to defend against lawsuits by private S.B. 8 litigants, and thus might eliminate all or most of the chilling effect created by S.B. 8.

However, Texas has asked U.S. Court of Appeals for the Fifth Circuit[4] to certify the issue of whether the licensing officials really do have authority to discipline violators of S.B. 8 under Texas law, to the Texas Supreme Court. The case was argued before the Fifth Circuit on Friday.

If the Fifth Circuit agrees, the litigation could be prolonged for many weeks, as the state Supreme Court addresses that issue.

Moreover, Texas could potentially plug this hole in S.B. 8 by passing a law stripping the licensing officials of any such enforcement power.

This in turn raises the issue of how much enforcement authority state officials need to have before citizens can file preenforcement lawsuits against them in order to protect constitutional rights.

Gorsuch's opinion is frustratingly vague on this key point. Some observers believe the pathway he leaves for preenforcement litigation is extremely narrow. Law professor Jonathan Adler, for example, describes this as a "slim pathway,"[5] while professor Josh Blackman suggests it may be even narrower than that.[6]

Gorsuch's opinion may well create more leeway for anti-S.B. 8 plaintiffs than these commentators suggest. As Gorsuch explains, the medical-licensing officials are subject to preenforcement lawsuits because

> [e]ach of these individuals is an executive licensing official who may or must take enforcement actions against the petitioners if they violate the terms of Texas's Health and Safety Code, including S. B. 8.

Specifically, he points out that they can enforce S.B. 8 because

> Texas Occupational Code §164.055 ... states that the Texas Medical Board "shall take an appropriate disciplinary action against a physician who violates ... Chapter 171, Health and Safety Code," a part of Texas statutory law that includes S. B. 8.

Section 164.055 does not actually impose any criminal or civil liability against violators.[7] Instead, it merely instructs the Texas Medical Board to "take an appropriate disciplinary

action against a physician who violates" the relevant section of the Health and Safety Code, including S.B. 8.

The only harm the medical providers are likely to suffer is loss of an opportunity to apply for a license or license renewal.

While Section 164.055 appears to require the board take disciplinary action, Gorsuch's opinion suggests that such a mandate isn't necessary to allow preenforcement lawsuits. It is enough that the defendants be officials who "may or must" take enforcement action.

In the modern regulatory state, there is a vast array of state and local officials and regulatory bodies who can potentially deny permits, licenses or regulatory approvals to people and organizations based on all sorts of possible violations of law. Consider examples like zoning boards, licensing boards, health and safety inspectors, land use regulators and many, many others.

To be sure, Gorsuch notes that would-be plaintiffs must face a credible threat of enforcement action. But that doesn't necessarily mean there must be a high likelihood of such enforcement.

Even, say, a 5% chance might be a credible threat, especially in a context where the consequences of such an action might be severe, as in the loss or suspension of a valuable license.

It is also possible that Gorsuch's reasoning permits preenforcement lawsuits against officials charged with enforcing state court judgments after the fact. Examples include sheriffs and other similar law enforcement officials.

Recall that Gorsuch's reason for rejecting the idea of suing state court clerks is that clerks "serve to file cases as they arrive, not to participate as adversaries in those disputes."

But that obviously isn't true of sheriffs and other officials who enforce judgments after a case is over. Their duty is to enforce rulings in favor of the winning side. And doing so is necessarily adverse to the interests of the losers.

There are no sheriffs or other similar defendants in the current S.B. 8 case. But abortion providers might be able to bring lawsuits against them in the future. And the same goes for lawsuits against law enforcement officials tasked with enforcing judgments under future laws imitating S.B. 8.

If Gorsuch's logic permits lawsuits against officials charged with enforcing court decisions, it offers a way to defeat the S.B. 8 ploy that state governments cannot readily circumvent by limiting the power of specific officials.

All lawsuits — including those by private litigants — require enforcement mechanisms to be effective, and government officials unavoidably have some role in that process.

Unlike in the case of the Texas medical licensing officials, these enforcers cannot be taken out of the equation without fatally undermining the effectiveness of the state law in question.

Admittedly, it's possible to set out a more limited interpretation of Gorsuch's opinion than the one set out above. The range of officials subject to preenforcement lawsuits under his

logic is far from completely clear.

Much hinges on the answer to this question. Other states have already begun efforts to imitate Texas' strategy.

California Democratic Gov. Gavin Newsom has called for the enactment of an S.B. 8-style law targeting gun rights.[8]

Florida Republican Gov. Ron DeSantis is pushing through a law that would allow similar private lawsuits against schools that teach critical race theory and private employers that require employees to undergo racial awareness and sensitivity training.[9]

If enacted, the California law would be a threat to Second Amendment rights, while the Florida one would imperil the First Amendment free speech rights of employers.

But, if Texas can insulate its assault on abortion rights from judicial review, other states — both red and blue — can and will do the same with laws intended to attack a wide range of other constitutional rights.

Rights valued by conservatives are no less threatened than those valued by liberals, and vice versa.

Moreover, many months might pass before federal courts ultimately clarify which officials can be sued to prevent enforcement of S.B. 8 schemes, and which cannot. It may take another Supreme Court decision to truly settle the issue.

Some conservatives might comfort themselves with the notion that S.B. 8-style laws will only threaten those constitutional rights that are not clearly protected by precedents the Supreme Court is unlikely to overturn or severely limit.

The conservative majority on the court may well overturn or limit Roe v. Wade, whereas it is unlikely to do the same with gun rights or freedom of speech.

But many constitutional rights have fuzzy boundaries, where there is room for judicial discretion in determining how far they extend. That is obviously true of gun rights, speech rights, property rights, freedom of religion and many, many others.

The resulting chilling effect is heightened by the unlimited extent of liability that states could potentially impose with S.B. 8-style laws. As Texas' solicitor general admitted in the oral argument,[10] there is no limit to the size of the fine a state can impose on its targets.

If the $10,000 or more allowed by S.B. 8 doesn't create enough of a chilling effect on the right targeted by the state, the latter can up the ante to $1 million or even more.

Indeed, even a small chance of incurring enormous liability may deter many people — particularly private individuals, as well as small businesses and nonprofits — from exercising their constitutional rights.

Imagine an S.B. 8 imitation law that imposes $1 million in liability on any person who possesses a handgun the state disapproves of, anyone who engages in hate speech or anyone who violates state-imposed restrictions on freedom of religion.

Conservatives who worry that blue states might force theologically conservative bakers and

artists to provide services for same-sex weddings might want to consider what will happen if those states can enact an S.B. 8-like law allowing anyone who wants to sue the recalcitrant baker for up to $1 million in damages if he persists in refusing to bake that cake.

Preenforcement judicial review is often the only effective way to prevent such possibilities from creating grave chilling effects where many people have to preemptively surrender their rights before even getting a chance to litigate them.

Unfortunately, the court's murky decision makes it difficult to tell when such review will be available.

This problem could have been avoided if only the court had adopted the sensible position urged by Chief Justice John Roberts in his partial concurring opinion in the S.B. 8 case, which explains why the court should have allowed lawsuits to proceed against Texas state court clerks.

As he points out:

> Court clerks … do not "usually" enforce a State's laws ... But by design, the mere threat of even unsuccessful suits brought under S. B. 8 chills constitutionally protected conduct, given the peculiar rules that the State has imposed. Under these circumstances, the court clerks who issue citations and docket S. B. 8 cases are unavoidably enlisted in the scheme to enforce S. B. 8's unconstitutional provisions, and thus are sufficiently [connected] to such enforcement to be proper defendants.

In its excellent amicus brief[11] in the case, the Firearms Policy Coalition urged an alternative, even better approach: doing away with sovereign immunity limitations on suing state officials for violating constitutional rights protected by the 14th Amendment.

As the FPC explains, these restrictions have no basis in the text and original meaning of the Constitution, and they go against the central purpose of the amendment, which was to ensure effective enforcement of constitutional rights against state governments, including through federal courts.

The FPC's opposition to S.B. 8 is also yet another sign that the law menaces far more than just abortion rights. The FPC, as its name implies, is a conservative-leaning group concerned about threats to gun rights.

Further federal litigation is not the only way to curb S.B. 8 and its potential imitations in other states.

A Texas state court recently ruled against S.B. 8 on state constitutional grounds,[12] though that decision will be reviewed by higher courts.

Similar laws in other states might be attacked under their state constitutions. But such rulings are necessarily limited to particular constitutional provisions in specific states.

Moreover, many state constitutions are easily amended, sometimes even by a narrow majority vote in a referendum. Thus, only federal court rulings are likely to provide a comprehensive nationwide solution to this menace.

Ultimately, the issues raised by the S.B. 8 case will only be fully resolved through later litigation.

The key question of which state officials can be sued to block enforcement of S.B. 8-style laws may well require another Supreme Court decision.

When and if such a case arises, we must hope that at least one of the five justices who joined the Gorsuch opinion will endorse a broad interpretation of the range of officials it subjects to lawsuits.

Fortunately, at least two of those justices — Kavanaugh and Barrett[13] — expressed grave concerns about the threat that S.B. 8-like laws posed to other constitutional rights.

As California and Florida have shown, that slippery slope has already begun to manifest itself. Hopefully, the Supreme Court will do a better job of curbing it the next time the justices consider the issue.

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[1] https://www.supremecourt.gov/opinions/21pdf/21-463_3ebh.pdf.

[2] https://www.scotusblog.com/case-files/cases/dobbs-v-jackson-womens-health-organization/.

[3] https://www.texastribune.org/2021/12/16/texas-abortion-law-legal-fight/.

[4] https://news.bloomberglaw.com/litigation/fifth-circuit-will-hear-texas-abortion-law-referral-jan-7.

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[10] https://reason.com/volokh/2021/11/01/abortion-providers-seem-likely-to-prevail-in-texas-sb-8-case/.

[11] https://reason.com/volokh/2021/10/31/the-firearms-policy-coalition-offers-a-simple-way-to-resolve-the-texas-sb-8-case/.

[12] https://reason.com/volokh/2021/12/09/texas-state-court-rules-sb-8-enforcement-mechanism-is-unconstitutional/.

[13] https://reason.com/volokh/2021/11/01/abortion-providers-seem-likely-to-prevail-in-texas-sb-8-case/.