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What the U.S. Supreme Court decision on Texas law means for abortion rights

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The United States Supreme Court refused this week to block a Texas law expected to shut down more than 85 per cent of legal abortions in that state. The decision highlights a law, and a legal process known as the "shadow docket," unlike anything Canadians have seen in their own country. Justice Writer Sean Fine explains.

What does the Texas law say?

The Texas Heartbeat Act provides that no abortion may be done if a doctor detects a fetal heartbeat - in effect, after six weeks' gestation. It isn't a criminal law. It allows civil suits against abortion providers and those who aid or abet the procurement of an abortion - even a family member driving a woman could be liable. (The woman obtaining the abortion cannot be sued.) Damages of no less than \$10,000 per abortion are provided for, plus legal costs. But if the doctor or other defendants win, they cannot be awarded costs.

Who can sue?

Only private citizens, who are in effect deputized as attorneys general. And they can be from anywhere in the United States. No one working for the government can sue under this law, an ap-

proach that legal experts say is designed to spare the state from legal challenges. "It's a crafty, devilish effort to circumvent the Constitution," says Richard Albert, a Canadian who is the William Strange Farish Professor in Law and director of constitutional studies at the University of Texas School of Law in Austin.

How did the case reach the shadow docket, and what is the shadow docket?

Abortion providers and others asked a federal judge in July to stop the law from taking effect on Sept. 1. The judge granted a stay until the court could decide the law's constitutionality. Texas asked an appeals court to dismiss the challenge as premature, and the court lifted the stay. The abortion providers then asked the Supreme Court on an emergency basis to stop the law from taking effect. The court has a process for urgent matters called the shadow docket, which it used to make its decision on the request. (As another example of the shadow docket process, Prof. Albert says he learned in law school that clerks are on duty each night in case a prisoner awaiting execution seeks the court's intervention. Recently, though, the court has used the shadow docket to allow executions blocked by lower courts.)

Did the court conduct a hearing?

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No. There is no adversarial hearing in open court in this process.

The judges review documents, including the record of the case at the lower courts. Chief Justice John Roberts provided details: "We are at this point asked to resolve these novel questions - at least preliminarily - in the first instance, in the course of two days, without the benefit of consideration by the District Court or Court of Appeals. We are also asked to do so without ordinary merits briefing [extensive legal documents including written arguments] and without oral argument." Prof. Albert calls the use of the shadow docket in a case in which women's bodily integrity is at risk a "denial of procedural justice, which we see has serious consequences for substantive justice."

Does Canada's Supreme Court have a shadow docket?

No, says Eugene Meehan, an Ottawa lawyer and former executive legal officer of the Supreme Court of Canada. If a province were to enact a similar law threatening to undermine a constitutional right, Prof. Albert says, the federal government could use the reference process to ask the Supreme Court for an advisory opinion before the law took effect. (Advisory opinions have no legal force, but in the Canadian system are as widely respected as if they did.)

Why did the U.S. Supreme Court decide not to block the law from taking effect? Texas's use of private-citizen enforcement paid off, at least in the short term. Five judges (including Justice Amy Coney Barrett, a Donald Trump appointee confirmed just a week before the election that ousted the former president) said in an unsigned opinion that

the case "presents complex and novel antecedent procedural questions." For instance, federal courts can issue injunctions stopping individuals from enforcing laws, but "not [stopping] the laws themselves." And no lawsuit from an individual was imminent. The majority stressed they were making no conclusion about the constitutionality of the Texas law.

How did the minority judges respond to the majority's decision?

Angrily. Justice Sonia Sotomayor called the Texas law "an act of defiance" of the Constitution and 50 years of the court's precedents. In effect, she said, Texas had "deputized the state's citizens as bounty hunters," and the court's majority had allowed the state to "evade federal judicial scrutiny by outsourcing the enforcement of unconstitutional laws to its citizenry." Justice Elena Kagan said "this court's shadow-docket decision-making ... every day becomes more unreasoned, inconsistent, and impossible to defend." Chief Justice Roberts, the lone Republican appointee in the minority, said the process did not allow due consideration, given the consequences. Justice Stephen Breyer said the law is causing abortion clinics to close, a harm that the court should have prevented.

What does the court's decision portend for a woman's right to an abortion in the U.S.?

Conservative activists on the Supreme Court have sent a message to states that welcomes "chipping away" at abortion rights established in 1973 in *Roe v. Wade* and subsequent cases, said Sharon Austin, a political-science professor at the University of Florida.

Prof. Albert, who will be the first Allan

Rock Visiting Professor at the University of Ottawa law school this fall, calls the case an important preview: "The right of a woman to procure an abortion is at serious risk not only of erosion but of destruction at the hands of the U.S. Supreme Court."

Where might the precedent of delegating enforcement to private citizens lead? Chief Justice Roberts warned it could become a "model for action in other areas." Prof. Albert mentioned a landmark 1948 case, *Shelley v. Kraemer*, in which a community in St. Louis, Mo., had a restrictive covenant barring Black people from buying property. The Supreme Court said the covenant itself wasn't illegal, but that the courts could not enforce it.

Given that ruling, the Texas approach of private enforcement may provide a means to undermine rights, Prof. Albert said.

"One of the defining features of the state is that it possesses a monopoly on the exercise of power.

What this law is doing is delegating some of that power to citizens in a way that I believe will redound to the detriment of rights and freedoms in the country. Because it's not going to end at just abortion," he said.

Do women in Canada have a recognized constitutional right to an abortion?

No. But the provision of abortion has not been criminalized since the Supreme Court of Canada struck down the federal abortion law in 1988. It is treated as a medical matter.