

Prepared Statement by U.S. Senator Chuck Grassley (R-Iowa)
Ranking Member, Senate Judiciary Committee
Hearing titled “Texas’s Unconstitutional Abortion Ban and the Role of the Shadow Docket”
Wednesday, September 29, 2021

Today, we are having a hearing because the Supreme Court did something very ordinary. Let that sink in: we are having a hearing because the Supreme Court did not do something extraordinary. It declined to intervene on an exceedingly expedited basis while reserving judgment on complex legal issues.

Much of the talk about the case has referred to the Court’s so-called “shadow docket.” For a long time, the Court and practitioners have called this the “emergency docket” because it’s designed so the Court can provide relief in emergencies. A good amount of these orders have historically dealt with last minute death penalty appeals, but we didn’t hear complaints from the other side about the docket for those cases.

So rather than rely on a catchy name invented by a law professor, let’s look at what the Supreme Court actually said in its decision on September 1. In that case, the plaintiffs waited several months to sue after the law was passed, so the courts did not have much time to work through the legal issues in the case. Having not succeeded in the lower courts, the plaintiffs asked the Supreme Court to grant them emergency relief.

A majority of the justices on the Supreme Court said that the abortion providers had raised “serious” constitutional arguments. They didn’t pre-judge the issue, but they acknowledged that the plaintiffs had a serious case. But the Court also said that the case raised novel procedural issues. It noted that under current precedent, it was not clear that the plaintiffs could sue the defendants. The Texas Heartbeat Act specifically prohibits several of the defendants from enforcing the law. Instead, private parties can do so in court. The majority noted that this system raised novel legal issues—and everyone seems to agree on that point. The Supreme Court said that it wanted the lower courts to address these novel issues first.

There are also at least fourteen suits in state court and the federal government’s suit against Texas. The courts are addressing the legal issues on an expedited time table. Those cases will work through the lower courts.

I’m looking forward to hearing more from our witnesses today about how the Supreme Court’s decision fits with its normal practices. Before we do that, I also want to talk about why we’re having this hearing now.

The Texas Heartbeat Act was signed into law in May. There are hearings in state and federal court this week and next about whether courts should grant relief. The abortion providers just asked the Supreme Court to take the case on the merits without waiting for the court of appeals. So why are we having this hearing in the last week of September?

It’s because the Supreme Court starts hearing cases next week. And this term, the Supreme Court has agreed to hear a case about a Mississippi law on abortion. The law protects the lives of unborn children

by prohibiting abortions after 15 weeks, with exceptions for medical emergencies. Mississippi said it enacted the law to protect the health of mothers, the dignity of unborn children, and the integrity of the medical profession.

Of the 59 countries that permit elective abortion, more than 75% do not allow elective abortions past 12 weeks gestation. But abortion activists are worried that the Supreme Court might agree that states can regulate abortion at 15 weeks.

Liberal dark money groups are also worried about that result. And they believe that a public campaign can influence the Supreme Court's decision. These groups have been publicly celebrating polls that show that the public's trust in the Supreme Court has dropped.

So why do polls show that public confidence may be decreasing? It's because dark money groups like Demand Justice are running multi-million dollar partisan smear campaigns against the Court. It's also because Senators on the other side have threatened the Supreme Court. They've called out justices by name and said those justices will "pay the price" if they ruled the wrong way. If the Justices reached the wrong result, they were told, "You won't know what hit you if you go forward with these awful decisions."

Other dark money groups, partisans, and activists undermine the Court by claiming that Justice Barrett's confirmation was an "illegitimate process," including one of the Democrat witnesses today. Democrats and partisan dark money groups love to predict the future. They certainly don't lack confidence in their predictions. But those predictions are not very good.

Democrats claimed that voting for Justice Barrett was voting "to strike down the Affordable Care Act and eliminate protections for millions of Americans with pre-existing conditions." Justice Barrett was a "judicial torpedo" aimed at those protections. That scared a lot of Americans. But it wasn't true.

Justice Barrett joined the Court's 7-2 majority that upheld the law.

Some Democrats have said the Court needs to "heal itself" before the public "demands" that the Court be "restructured in order to reduce the influence of politics." That's a fancy way of saying that, if the rulings don't change, they'll try to pack the court.

This campaign against the Court—and against individual justices—has hurt the public. The dishonest rhetoric doesn't help the American people understand the issues. I'll continue fighting back against the partisan efforts by dark money groups to attack our judiciary.

There's one final point I want to raise today before we hear from the witnesses. The House of Representatives just passed a bill that could allow abortion on demand. It would preempt numerous pro-life state laws, and it would throw out the protections of the Religious Freedom Restoration Act. If Democrats truly believe that the Court will overrule Roe, they should have a hearing on that bill in this Committee. The American people would see how radical that bill is.

Contrary to the outlandish claims by abortion activists, the Supreme Court did not overrule Roe. I think our witnesses today will help explain this, and offer some much needed information about the role of the emergency docket at the Supreme Court.

