

**Testimony of Fatima Goss Graves
President and CEO
National Women’s Law Center**

**Senate Committee on the Judiciary
“Texas’s Unconstitutional Abortion Ban and the Role of the Shadow Docket”
September 29, 2021**

Thank you for the opportunity to provide testimony to the Senate Committee on the Judiciary on Texas’s Unconstitutional Abortion Ban and the Role of the Shadow Docket. At the National Women’s Law Center we fight for gender justice – in the courts, in public policy, and in our society – working across the issues that are central to the lives of women and girls, including child care and early learning, education, reproductive rights and health, income security, and workplace justice.

Access to reproductive health care, including abortion, is vital to gender justice. The ability to make the decision of whether to have an abortion, including the ability to access available and affordable abortion care, is a key part of a person’s liberty and equality. Because of that basic truth, for nearly 50 years, the Supreme Court has squarely recognized that the U.S. Constitution protects the fundamental right to abortion.

And yet, despite the long-standing precedent, reaffirmed by the Supreme Court as recently as 2020, the fundamental right to abortion is at a perilous crossroads due to a decades-long effort by abortion opponents to attack *Roe* and abortion access in court, with legislation, and through the purposeful manipulation of our democratic system – including gerrymandering state districts and engaging in systemic voter oppression.

In the decades since *Roe v. Wade* was decided, abortion opponents have enacted more than a thousand abortion restrictions.¹ These laws create a web of interlocking, medically unnecessary barriers and targeted burdens that force abortion clinics to close and that delay, obstruct, and deny people access to constitutionally protected health care.

These efforts make the promise and protections of *Roe* a right in name only for millions of people across this country. For example, between 2011 and 2017, the South lost 50 abortion clinics and the Midwest lost 33 clinics, in part because of laws targeting abortion clinics.² Right now, nearly

¹ ELYSSA SPITZER & NORA ELLMANN, CTR. FOR AM. PROGRESS, STATE ABORTION LEGISLATION IN 2021 3 (2021) (providing that as of August 2021, states have enacted 1,327 abortion restrictions since *Roe v. Wade* was decided), https://cdn.americanprogress.org/content/uploads/2021/09/20132731/AbortionLegislation-brief.pdf?_ga=2.96033436.1817694014.1632245924-554239022.1632245924.

² Elizabeth Nash & Joerg Dreweke, *The U.S. Abortion Rate Continues to Drop: Once Again, State Abortion Restrictions Are Not the Main Driver*, 22 GUTTMACHER POL’Y REV. 41, 42 (2019) (describing the disparate increase of abortion restrictions within specific regions of the U.S. compared to others), <https://www.guttmacher.org/gpr/2019/09/us-abortion-rate-continues-drop-once-again-state-abortion-restrictions-are-not-main>.

90% of U.S. counties do not have an abortion provider, and that is with *Roe v. Wade* still in place.³ The resulting shortage of abortion providers has not ended the need for abortion care. Instead people who seek abortions now experience longer waiting times for appointments and increased travel to clinics, which often result in increased associated costs – such as long-distance travel, a hotel stay in a different city, additional child care costs, and more time off work.⁴ These costs compound with other restrictions intended to make abortion unaffordable and, therefore, inaccessible, like laws prohibiting insurance coverage of abortion and forcing people seeking abortion to pay out of pocket for that care.⁵

For many years, anti-abortion state lawmakers justified these restrictions with false claims about protecting women’s health. As president of an organization dedicated to gender justice, I can say with certainty that these laws do not improve women’s health. Not only do abortion restrictions actually threaten individuals’ health and well-being, but the same state lawmakers passing abortion restrictions have refused to enact policies that actually protect health care and promote equality.⁶ For example, in the last decade Mississippi has passed multiple abortion restrictions, resulting in the closure of all but one clinic in the state. In the same period the state has refused to expand Medicaid despite having a maternal mortality rate of over 27 deaths for every 100,000 live births in 2019.⁷ It also lacks anti-discrimination protections for pregnant students and has one of the largest gender wage gaps in the country.⁸

Anti-abortion efforts have intensified dramatically in the last three years, both in terms of the number of restrictions and in terms of how extreme they are. Abortion opponents were emboldened following the confirmation of Justice Kavanaugh to the Supreme Court, believing that the prospect of his appointment as Justice taking the place of Justice Kennedy, who had repeatedly voted to

³ Alice F. Cartwright et. al, *Identifying National Availability of Abortion Care and Distance From Major US Cities: Systematic Online Search*, 20 J. MED INTERNET RES. 1, 2 (2018), <https://www.jmir.org/2018/5/e186/>.

⁴ See Br. of Amici Curiae National Women’s Law Center and 47 Addition Organizations Committed to Equality and Economic Opportunity for Women in Supp. of Pet’rs at 14–15, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15-274) (describing the logistical and economic barriers to abortion access that people face as a result of abortion restrictions), https://nwlc.org/wp-content/uploads/2016/01/RRH_Whole-Womens-Health-Amicus-Brief_1.4.16.pdf.

⁵ See GUTTMACHER INSTL., THE HYDE AMENDMENT: A DISCRIMINATORY BAN ON INSURANCE COVERAGE OF ABORTION (2021) (highlighting how “[m]any people living with low incomes experience delays obtaining abortion care because of time and effort spent to gather the necessary funds”), <https://www.guttmacher.org/fact-sheet/hyde-amendment>.

⁶ See CTR. FOR REPRODUCTIVE RIGHTS & IBIS REPRODUCTIVE HEALTH, EVALUATING PRIORITIES: MEASURING WOMEN’S AND CHILDREN’S HEALTH AND WELL-BEING AGAINST ABORTION RESTRICTIONS IN THE STATES 15 (Vol. II, 2017), <https://www.reproductiverights.org/sites/default/files/documents/USPA-Ibis-Evaluating-Priorities-v2.pdf>.

⁷ AM.’S HEALTH RANKINGS, MATERNAL MORTALITY IN MISSISSIPPI (2019), <https://www.americashealthrankings.org/learn/reports/2019-health-of-women-and-children-report/state-summaries-mississippi>.

⁸ See Br. of Amici Curiae National Women’s Law Center and 72 Additional Organizations Committed to Gender Equality in Support of Resp’ts at 33, *Dobbs v. Jackson Women’s Health Org.*, 209 L. Ed. 2d 748 (May 17, 2021) (No. 19-1392), <https://nwlc.org/resources/nwlc-files-amicus-brief-on-behalf-of-72-organizations-in-supreme-court-case-deciding-the-future-of-the-right-to-abortion/>.

uphold *Roe v. Wade*, would mean the end of abortion in this country.⁹ After the death of Justice Ginsburg and the confirmation of Justice Barrett, which gives the Court a solid majority of Justices with anti-abortion records, anti-abortion politicians went into overdrive. In 2021 alone, abortion opponents have introduced more than 560 abortion restrictions,¹⁰ so far passing more than 90 restrictions designed to eliminate access to safe, legal abortion across the country, including Texas's SB 8.¹¹ At the same time, anti-abortion state lawmakers are passing increasingly extreme measures. Before 2019, only two states had passed bans on abortion after six weeks of pregnancy.¹² Today, 13 states have passed blatantly unconstitutional laws that either ban abortion after six weeks of pregnancy or simply ban abortion entirely.¹³

There can be no uncertainty about the aim of these extreme measures – to eliminate abortion altogether. In fact, in the last three years anti-abortion extremists mostly have abandoned the strategy of hiding behind false claims around protecting women and instead have been unabashed about their goals. As an Alabama lawmaker said in support of an anti-abortion bill in the state, “We probably have the most conservative court that we’ve had in generations, and this is the best opportunity for the court to take another look at *Roe v. Wade*.”¹⁴ Anti-abortion extremists want to send a case to the rapidly re-constituted Supreme Court that directly challenges *Roe v. Wade*, giving the Court an opportunity to either overrule it outright or gut it so significantly that available and affordable abortion access is eliminated. Their goal may be in reach. On December 1, the Supreme Court will hear oral arguments in *Dobbs v. Jackson Women’s Health Organization*. In that case, the state of Mississippi has explicitly asked the Court to overturn *Roe* and *Planned Parenthood v. Casey*, in order to uphold the state’s ban on abortion after 15 weeks of pregnancy. Significantly, overturning *Roe* and its progeny would have ripple effects well beyond abortion access. *Roe* and *Casey* are part of a long line of cases recognizing constitutional rights to liberty

⁹ See e.g. David A. Lieb & Steve LeBlanc, *Supreme Court could return abortion debate to the states*, AP NEWS, (July 12, 2018), <https://apnews.com/article/donald-trump-wv-state-wire-mo-state-wire-brett-kavanaugh-supreme-courts-518f4ca098b4445b8db19d498fd376ca> (“The time is right. We need to act on it,” said Missouri Rep. Mike Moon, who is hoping Trump’s Supreme Court appointment breathes new life into an anti-abortion state constitutional amendment....”).

¹⁰ ELIZABETH NASH & LAUREN CROSS, GUTTMACHER INSTL., 2021 IS ON TRACK TO BECOME THE MOST DEVASTATING ANTIABORTION STATE LEGISLATIVE SESSION IN DECADES (2021), <https://www.guttmacher.org/article/2021/04/2021-track-become-most-devastating-antiabortion-state-legislative-session-decades>.

¹¹ ELIZABETH NASH & SOPHIA NAIDE, GUTTMACHER INSTL., STATE POLICY TRENDS AT MIDYEAR 2021: ALREADY THE WORST LEGISLATIVE YEAR EVER FOR U.S. ABORTION RIGHTS (2021), <https://www.guttmacher.org/article/2021/07/state-policy-trends-midyear-2021-already-worst-legislative-year-ever-us-abortion>.

¹² ELIZABETH NASH, GUTTMACHER INSTL., A SURGE IN BANS ON ABORTION AS EARLY AS SIX WEEKS, BEFORE MOST PEOPLE KNOW THEY ARE PREGNANT (2019) (identifying the first states to pass six-week abortion bans, including North Dakota in 2013 and Iowa in 2018), <https://www.guttmacher.org/article/2019/03/surge-bans-abortion-early-six-weeks-most-people-know-they-are-pregnant>.

¹³ GUTTMACHER INSTL., STATE BANS ON ABORTION THROUGHOUT PREGNANCY (last visited Sept. 27, 2021)

¹⁴ Chloe Atkins, ‘A Crisis Moment’: States, advocates brace for new fight over abortion rights, NBC NEWS (Jan. 11, 2021), <https://www.nbcnews.com/politics/politics-news/crisis-moment-states-advocates-brace-new-fight-over-abortion-rights-n1253665>.

and personal decision-making including the rights to birth control, to marry, to parent, and to shape our own families.

As the *Jackson Women's Health Organization* case – and others like it¹⁵ – proceed through the courts, abortion opponents devised yet another strategy to escalate the elimination of abortion access. Texas's SB 8 was specifically written to shut down abortion care and evade judicial review. Unlike other laws banning abortion at six weeks of pregnancy – all of which have been blocked by courts before going into effect for being blatantly unconstitutional¹⁶ – this law's enforcement mechanism was designed to stymie providers and people in need of abortion care from seeking relief in the courts. When combined with the confirmation of judges with anti-abortion records, this strategy proved effective. In a shadow docket ruling in the middle of the night, five Supreme Court justices allowed Texas the ability to take away people's constitutional right and effectively shut down legal abortion in the state.

SB 8 is having its intended effect: as a result of the law, abortion providers in the state have stopped providing nearly all abortions after six weeks. Prior to the law, this amounted to between 85 and 95% of abortions provided in Texas.¹⁷ Because SB 8 allows private citizens to enforce the law, it emboldens anti-abortion extremists and exacerbates a climate of anti-abortion violence, harassment, and intimidation. We must be clear about who bears the brunt of this law. It's Black and Latinx individuals who are disproportionately likely to live in poverty in Texas because of decades of racist policies. Texas patients in need of an abortion after six weeks now must drive an average of 230 miles *farther each direction* to access their closest clinic,¹⁸ which will not be

¹⁵ There are nearly 20 current federal court cases involving abortion at or above the Circuit Court level. As the SB 8 case demonstrates, each of these is mere steps away from a potential Supreme Court decision either through a full merits briefing and decision or the shadow docket. See CTR. FOR REPRODUCTIVE RIGHTS, CASES ARCHIVE, <https://reproductiverights.org/cases/>, (last visited Sept. 27, 2021) (listing open CRR federal court cases related to abortion access); Kimberly Leonard, *A more conservative Supreme Court is primed to weaken or nix Roe v. Wade even with Joe Biden in the White House. Here are 16 abortion cases in the pipeline to the high court*, BUSINESS INSIDER (Feb. 2, 2021), <https://www.businessinsider.com/rbg-abortion-rights-supreme-court-trump-roe-wade-nominee-2020-9>, (listing abortion cases in the pipeline through February 1, 2021, date article was published).

¹⁶ See e.g. *Memphis Ctr. for Reprod. Health v. Slatery*, No. 20-5969, 2021 WL 4127691, at *20 (6th Cir. Sept. 10, 2021) (affirming the district court's judgment enjoining implementation of Tennessee six-week abortion ban); *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 776 (8th Cir. 2015) (granting permanent injunction of North Dakota HB 1456 ban on abortion at 6 weeks); *SisterSong Women of Color Reprod. Just. Collective v. Kemp*, 472 F. Supp. 3d 1297, 1328 (N.D. Ga. 2020) (blocking Iowa 6-week abortion ban, HB 481); *Planned Parenthood of the Heartland, Inc. v. Reynolds*, No. EQCE83074, 2019 WL 312072, at *5 (Iowa Dist. Jan. 22, 2019) (striking down 6-week abortion ban, Iowa Code § 146C.2); *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, No. 3:19-CV-178-DJH, 2019 WL 1233575, at *2 (W.D. Ky. Mar. 15, 2019) (granting a temporary injunction of Kentucky six-week abortion ban, Senate Bill 9); *Planned Parenthood S. Atl. v. Wilson*, No. CV 3:21-00508-MGL, 2021 WL 1060123, at *12 (D.S.C. Mar. 19, 2021) (granting preliminary injunction of South Carolina six-week abortion ban, S.1); *Preterm-Cleveland v. Yost*, 394 F. Supp. 3d 796, 804 (S.D. Ohio 2019) (declaring Ohio SB 23 unconstitutional and blocking enforcement of the 6-week ban).

¹⁷ U.S. Emergency Mot. for a TRO or Prelim. Inj. 7, Sept. 14, 2021 (citing to declarations of several Texas abortion providers), <https://int.nyt.com/data/documenttools/justice-department-emergency-motion-for-a-restraining-order-to-stop-enforcement-of-texas-abortion-law/2390e9fb0dedfb2c/full.pdf>.

¹⁸ GUTTMACHER INSTITUTE, IMPACT OF TEXAS' ABORTION BAN: A 14-FOLD INCREASE IN DRIVING DISTANCE TO GET AN ABORTION (2021) (providing that "there were seven million women of reproductive age in Texas as of 2019,

possible for many pregnant people. The law threatens the financial security for people who need abortions – many people struggling to make ends meet simply cannot afford the additional expenses or time off work. It also provides special burdens for people who are already parents, as additional child care needs pile up alongside the increased travel. And those who live in rural areas like the Rio Grande Valley, particularly immigrants without documentation, will not be able to make the arduous trip.

For these individuals, there is no practical difference between the Supreme Court allowing SB 8 to go into effect and a decision overturning *Roe* – there is no meaningful constitutional right to abortion without access.

What is happening in Texas is the horrifying but inevitable outcome of decades of attacks by anti-abortion state lawmakers, and it was made possible by strategic manipulation of the shadow docket and a strong anti-abortion majority on the Court. When President Trump promised to “automatically” overturn *Roe* by appointing Justices to the Supreme Court, many dismissed the idea that such a thing could happen automatically.¹⁹ I was certainly one of the people who put faith in the idea that fundamental rights are not so easily cast aside in a constitutional democracy. Instead, these words have turned out to be horrifyingly prescient. Using the shadow docket, the anti-abortion majority on the Court effectively overturned *Roe v. Wade* for 1 in 10 women of reproductive age in this country²⁰ in a one paragraph opinion and, as Justice Kagan noted, “without full briefing or arguments, and after less than 72 hours’ thought.”²¹

This is a constitutional crisis. Decades of precedent make clear that the people of this country have a fundamental right to abortion. Opponents must not be allowed to manipulate the law and, in the words of Justice Sotomayor, “the Court should not be so content to ignore its constitutional obligations.”²² As president of an organization that fights for gender justice, including abortion justice, I know that we cannot have gender justice as long as the right to abortion and ability to access abortion care can be gutted so carelessly. We will continue to fight to ensure everyone can access available and affordable abortion care. We need Congress to do the same, not only by

and if most or all legal abortion care in the state were shut down, the average one-way driving distance to an abortion clinic would increase...to 247 miles”), <https://www.guttmacher.org/article/2021/08/impact-texas-abortion-ban-14-fold-increase-driving-distance-get-abortion#>.

¹⁹ Aaron Blake, *Trump makes clear Roe v. Wade is on the chopping block*, THE WASHINGTON POST (July 2, 2018), <https://www.washingtonpost.com/news/the-fix/wp/2018/07/02/trump-makes-clear-roe-v-wade-is-on-the-chopping-block/>.

²⁰ GUTTMACHER INSTITUTE, IMPACT OF TEXAS’ ABORTION BAN: A 14-FOLD INCREASE IN DRIVING DISTANCE TO GET AN ABORTION (Sept. 15, 2021), <https://www.guttmacher.org/article/2021/08/impact-texas-abortion-ban-14-fold-increase-driving-distance-get-abortion#> (providing that one in ten women cannot access abortion in the U.S. following enactment of Texas SB8).

²¹ Justice Kagan further explains the cursory nature of the decision, stating that “[t]he majority has acted without any guidance from the Courts of Appeals... It has reviewed only the most cursory party submissions, and then only hastily. And it barely bothers to explain its conclusion...” *Whole Woman’s Health v. Jackson*, No. 21A24, 2021 WL 3910722, at *5 (U.S. Sept. 1, 2021) (Kagan, J., dissenting).

²² *Whole Woman’s Health v. Jackson*, No. 21A24, 2021 WL 3910722, at *5 (U.S. Sept. 1, 2021) (Sotomayor, J., dissenting).

investigating this cynical manipulation of the shadow docket but by affirmatively protecting the right to abortion and passing laws that protect and expand abortion access, like the Women's Health Protection Act.

Thank you.