



# After *Roe*: Criminal Abortion Bans in Texas

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On June 24, 2022, the United States Supreme Court issued its decision in *Dobbs v. Jackson Women's Health Organization* and overturned *Roe v. Wade*, the landmark case that established the constitutional right to abortion in 1973 and overturned Texas's criminal abortion bans.<sup>1</sup> With this decision, the Court has granted states the authority to impose laws that would criminalize abortion. In Texas, there are several such laws, most of which were unconstitutional under *Roe v. Wade*, but will soon be enforced.

In this policy brief, we review Texas's criminal abortion bans and their significance for abortion access in the state. While prosecutors may employ other criminal laws, we focus on the four criminal laws that most specifically will affect abortion in Texas:

- House Bill 1280 (HB 1280): bans abortion after *Roe* is overturned
- Senate Bill 4 (SB 4): prohibits mailing medication abortion pills
- Pre-*Roe* bans: criminalize providing or helping provide any abortion
- Homicide statute: criminalizes actions that cause the death of an individual

Table. Criminal bans on abortion in Texas (*continued on next page*)

LAW	PENALTIES <sup>2</sup>	EXEMPTIONS	IMPLEMENTATION TIMELINE
<b>HB 1280 (TRIGGER BAN)<sup>3</sup>:</b> Prohibits a person from knowingly performing, inducing, or attempting an abortion on another	<ul style="list-style-type: none"> <li>• A person who knowingly performs or induces an abortion commits a first-degree felony, punishable by 5 years to life in prison and at least \$100,000.</li> <li>• A person who attempts an abortion commits a second-degree felony, punishable by 2 to 20 years in prison.</li> </ul>	<ul style="list-style-type: none"> <li>• Medical emergencies</li> </ul>	<ul style="list-style-type: none"> <li>• The law takes effect 30 days after a Supreme Court judgment overturning <i>Roe v. Wade</i>.</li> </ul>
<b>SB 4<sup>4</sup>:</b> Prohibits the provision of medications for the purposes of causing an abortion after 49 days (7 weeks) of gestation or later. SB 4 also prohibits the medications from being provided by courier, delivery, or mail service, among other restrictions.	<ul style="list-style-type: none"> <li>• A person who intentionally, knowingly, or recklessly provides medication abortion in violation of SB 4, including providing medications by telehealth or mail, can be jailed for no less than 180 days and no more than 2 years and can be fined up to \$10,000.</li> </ul>	<ul style="list-style-type: none"> <li>• Miscarriage management and removal of an ectopic pregnancy</li> </ul>	<ul style="list-style-type: none"> <li>• This law went into effect December 2, 2021.</li> </ul>

Note: This policy brief does not constitute legal advice from the authors.



**Table. Criminal bans on abortion in Texas**

LAW	PENALTIES	EXEMPTIONS	IMPLEMENTATION TIMELINE
<p><b>PRE-ROE BAN (2A TEXAS PENAL CODE ARTS. 1191-1194, 1196, (1961))<sup>5</sup>:</b> Prohibits a person from “designedly administer[ing] to a pregnant woman or knowingly procur[ing] to be administered with her consent any drug or medicine” or performing a procedure and thereby procuring an abortion. A person who provides the means for procuring an abortion, knowing the purpose is to provide an abortion, is guilty as an accomplice.</p>	<ul style="list-style-type: none"> <li>• A person who designedly administers or knowingly procures to be administered a drug or medicine for an abortion, or performs a procedure that procures an abortion, faces 2 to 5 years imprisonment.</li> <li>• A person who violates the law by attempting to produce an abortion shall be fined not less than \$100 nor more than \$1,000.</li> </ul>	<ul style="list-style-type: none"> <li>• To save the life of the pregnant person</li> </ul>	<ul style="list-style-type: none"> <li>• The Supreme Court held this law unconstitutional in <i>Roe v. Wade</i> in 1973. Experts disagree as to whether it would come back into effect after <i>Roe</i> is overturned.</li> </ul>
<p><b>CRIMINAL HOMICIDE, TEXAS PENAL CODE, TITLE 5, CHAPTER 19<sup>6</sup>:</b> Prohibits criminal homicide where a person intentionally, knowingly, recklessly, or with criminal negligence causes the death of an individual. An individual is defined to include “an unborn child at every stage of gestation from fertilization until birth.”</p>	<ul style="list-style-type: none"> <li>• Depending on the person’s intent and the circumstances, punishment could range from capital punishment to life imprisonment to 180 days in state jail.</li> </ul>	<ul style="list-style-type: none"> <li>• Excepts legal abortions; certain procedures as part of assisted reproduction; and dispensation or administration of legal drugs, which until recently included medication abortion*</li> </ul>	<ul style="list-style-type: none"> <li>• This law was revised in 2003.</li> </ul>

\* Texas’s Penal Code exempts “a lawful medical procedure” performed by a physician or other licensed healthcare provider where fetal demise is the intended result; a lawful medical procedure performed as part of assisted reproduction; and “the dispensation of a drug in accordance with law or administration of a drug prescribed in accordance with law.”



## Will abortion still be legal in Texas now that the Supreme Court has overturned *Roe v. Wade*?

No. Thirty days after the Supreme Court issues a judgment that overturns *Roe*, Texas's trigger law will prohibit someone from providing or attempting to provide abortions in Texas, except in the very narrow circumstances described below. The Court's judgment will likely occur within a month of its opinion in *Dobbs*. In the interim, SB 4 will criminalize medication abortion after 7 weeks of gestation.

Although Texas's pre-*Roe* criminal abortion laws were found unconstitutional by the Supreme Court in *Roe v. Wade*, some assert these laws would immediately go back into effect after the Court overturns *Roe*.<sup>7,8</sup>

## Are there medical or health exemptions allowing some abortions to be provided?

Texas's laws will only permit abortions if there is a medical emergency. This means that a person is experiencing a "life-threatening physical condition aggravated by, caused by, or arising from a pregnancy" that puts them "in danger of death or a serious risk of substantial impairment of a major bodily function unless an abortion is performed."<sup>9</sup> A physician providing the abortion must submit documentation describing the condition and certify that the abortion was necessary.

People who experience other pregnancy complications, such as rupture of membranes or preeclampsia\* before fetal viability, may not be able to get appropriate medical care in Texas until their condition becomes life-threatening. Healthcare providers and the institutions where they practice may have different interpretations about when a health-threatening condition becomes life-threatening (see Box: Chilling Effects of Abortion Restrictions).

Physicians also would not be allowed to provide abortions for reasons related to severe or life-limiting fetal diagnoses, such as anencephaly (incomplete development of the brain, skull), renal agenesis (failure of the kidneys to develop), and trisomy 18 (also known as Edward's syndrome).

### BOX: CHILLING EFFECT OF ABORTION RESTRICTIONS

Texas's abortion restrictions have had a chilling effect on the provision of evidence-based medical care for pregnant people, because clinicians fear they will face consequences if another person does not deem the care they provided permissible under Texas law.<sup>10,11</sup> Clinicians have been reluctant or unable to provide abortion care for some of the following reasons, even though an abortion in these cases would protect the pregnant person's health:

- Cancer, requiring treatment or chemotherapy that will affect pregnancy
- Ectopic pregnancy implanted in a cesarean scar
- End-stage kidney disease, exacerbated by pregnancy
- Fetal hydrops (edema) with mirror syndrome
- Maternal cardiac conditions, such as cardiomyopathy and heart failure
- Pre-viable rupture of membranes without signs of infection or hemorrhage
- Selective fetal reduction in a twin or multifetal pregnancy
- Severe hyperemesis gravidarum

\* Rupture of amniotic membranes before fetal viability presents major health risks to the pregnant person, including severe, life-threatening infection and bleeding. Preeclampsia is a condition involving high blood pressure in pregnancy that can result in fatal seizures. Dangerous complications from these conditions can be prevented with timely access to abortion care.



### **What about in cases of rape or incest? Can abortion be provided then?**

No, Texas's laws do not have exceptions for abortions where the pregnancy resulted from rape or incest.

### **What happens if someone has a miscarriage or ectopic pregnancy?**

Texas law excludes from its definition of abortion the treatment of miscarriage where there is fetal demise or removal of an ectopic pregnancy that has implanted "outside the uterus,"<sup>12</sup> even though the same medications and procedures used to provide abortion care may be used in such cases.

However, if a person is experiencing an inevitable miscarriage and a healthcare provider can still detect embryonic or fetal cardiac activity, the person might be denied standard care until fetal cardiac activity is no longer detectable or the pregnancy becomes life-threatening because other Texas abortion restrictions may still apply. Physicians may also be reluctant to provide care for ectopic pregnancies that implant in the cervix, cornua of the uterus or a cesarean scar, which can be life-threatening if not treated early.<sup>13</sup>

Additionally, since Texas SB 4 went into effect in 2021, some patients have reported problems getting medications to treat their miscarriage or ectopic pregnancy because of expansive interpretations of criminal prohibitions on the provision of medication abortion.<sup>14</sup>

### **What are the penalties for violating the criminal laws prohibiting abortion?**

If a person provides an abortion that is not permitted under Texas law, they could face imprisonment and fines up to \$100,000 for each violation, depending upon which law is used to bring charges (see Table).

### **Will criminal bans on abortion apply to people who provide abortions to Texas residents outside of Texas?**

The abortion-specific laws only apply to abortions that occur in the state of Texas. However, the state can prosecute people outside of Texas who mail abortion medications to someone in Texas because doing so violates Texas SB 4.<sup>15</sup> It is unknown whether prosecutors will attempt to extend other criminal laws outside the state.

### **Will criminal abortion laws apply to a pregnant person who has an abortion?**

Neither the pre-Roe criminal bans nor Texas's trigger ban on abortion apply to pregnant people who have had an abortion. Likewise, the Texas homicide statute exempts a pregnant person for conduct they committed that caused the end of their pregnancy. However, prosecutors have brought criminal charges against pregnant people experiencing miscarriage or fetal demise using other laws, such as child endangerment, murder, and distribution of drugs to a minor. In Texas, there have been cases in which a pregnant person has been unlawfully investigated and arrested.<sup>16</sup> In April 2022, a woman in South Texas was arrested, jailed, and held on \$500,000 bond after presenting to an emergency room for care. The charges were eventually dropped.<sup>17</sup>

### **Will people have to worry about breaking the law if they help someone get an abortion in Texas that is prohibited by criminal abortion laws?**

Yes, it is possible that people who assist a pregnant person could be charged with a crime. If Texas's pre-Roe abortion law is enforced, it applies to people who knowingly furnish the means for procuring an abortion. In addition to the criminal abortion bans, other restrictions—such as requirements that only a licensed physician perform an abortion—remain in effect and penalties could apply to those who help facilitate abortion access and violate those restrictions. General criminal laws, including the homicide statute, could also be used to bring charges against someone who conspires or assists a pregnant person to access an illegal abortion in the state. Civil liability also is a risk. Under Texas's SB 8, civil lawsuits can be filed against people suspected of "aiding and abetting" an abortion in Texas after cardiac activity can be detected (see Box: Senate Bill 8, next page).



**BOX: SENATE BILL 8**

Texas Senate Bill 8 (SB 8) prohibits anyone from providing an abortion after detection of embryonic cardiac activity, about 5 or 6 weeks from a person’s last menstrual period. The law also prohibits anyone from aiding and abetting an abortion in Texas after embryonic cardiac activity is detected. The law, which went into effect on September 1, 2021, is enforced by private citizens, not state agencies.

A person who is found to have violated the law may pay at least \$10,000 and the cost of legal fees.

**Where will pregnant Texans still be able to access legal abortion?**

Three of Texas’s four bordering states (Arkansas, Louisiana, and Oklahoma) also have laws that will prohibit nearly all abortions within their state boundaries now that the Supreme Court has overturned *Roe v. Wade*.<sup>18</sup> When these trigger laws go into effect, this will force Texans seeking abortion to travel very long distances. New Mexico, Kansas, and Colorado would be some of the nearest states where Texans could obtain facility-based abortion care (See: Map). Whether Kansas remains an option for Texans will depend, in part, on the outcome of an August 2022 election that could remove abortion protections from the state’s constitution.<sup>19</sup>

**MAP: TRAVEL DISTANCES FROM TEXAS CITIES TO SELECT OUT-OF-STATE ABORTION FACILITIES\***



\*Texas and states in gray have trigger bans prohibiting abortion. Kansas could prohibit abortion following changes to the state’s constitution.



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