



Written by [Bob Adelman](#) on October 15, 2021

Fifth Circuit Three-judge Panel Allows Texas Heartbeat Law to Remain in Place

A three-judge panel of the Fifth Circuit Court of Appeals [ruled late Thursday](#) that Texas' S.B. 8 law — its so-called “heartbeat law” — is to remain in place. It rejected the Biden administration's plea for a temporary injunction against enforcement of the law. And it's the third time that the Fifth Circuit has ruled in favor of life for an unborn infant in the case.

The decision came after a brief from 17 state attorneys general was filed on Wednesday supporting the Texas law. Supporters of abortion feared that the heartbeat law as crafted by Texas could serve as a model for similar laws being enacted elsewhere, and this filing no doubt confirmed their fears.



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Attorney General Merrick Garland called the Texas law “clearly unconstitutional” and filed a lawsuit against Texas over the law. Indiana AG Theodore Rokita blasted Garland, claiming “the Attorney General has no authority to act as a roving reviser of state law, challenging as unconstitutional any rule with which he disagrees.”

Biden's Department of Justice now must decide whether to request a full-court review of the three-judge panel's ruling, or to go directly to the Supreme Court on appeal.

The Supreme Court isn't likely to accept the appeal, as it has already completed and announced its calendar of cases it will take for its fall term. Besides, one of those cases just might end the controversy over the Texas law.

When Mississippi Attorney General Lynn Fitch filed the state's appeal of *Dobbs v. Jackson Women's Health Organization* to the Supreme Court she asked, “Under the Constitution, may a State prohibit elective abortions [murder on demand] before viability? Yes! Why? Because nothing in constitutional text, structure, history, or tradition supports a right to abortion.”

That case won't be heard until December, and the decision won't be announced until June next year. But a brief review of where each Supreme Court justice stands on the issue is helpful.

Chief Justice John Roberts is a waffle. He dissented in a case in 2016 when the court struck down restrictions on abortion by Texas. Four years later, in a nearly identical case from Louisiana, he wrote the lead opinion for the court's decision to strike down that law.

So, call him a waffle on the right to life in the womb.

On the other hand, both justices Clarence Thomas and Samuel Alito have voted for the right to life in every case they've considered.

That makes two, for life.



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Justices Stephen Breyer, Sonia Sotomayor, and Elena Kagan, on the other hand, support the right to abortion every chance they get. Breyer said the court's decision to let Texas' "heartbeat law" stand (without ruling on its merits) "was very, very, very wrong." Kagan called the Texas law "patently unconstitutional," while Sotomayor has voted repeatedly in favor of abortion on demand since she joined the court in 2009.

That makes three, for death.

The remaining three, justices Neal Gorsuch, Brett Kavanaugh, and Amy Coney Barrett, voted to let the Texas law stand. Other than that, their brief time on the high court has not allowed them to accumulate a record on this vital issue. Kavanaugh has successfully avoided answering questions on his own personal beliefs, while Barrett has made clear in the past her long-standing opposition to abortion "rights."

That makes three more, for life. Hopefully.

The final decision in *Dobbs* should be 9-0. But more likely it will be 5-4, on either side. In the meantime, babies are being saved from extermination in Texas, thanks to the Fifth Circuit.

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