

# CAPTURED COURTS

The Republican  
Judicial Assault  
on Reproductive  
Rights



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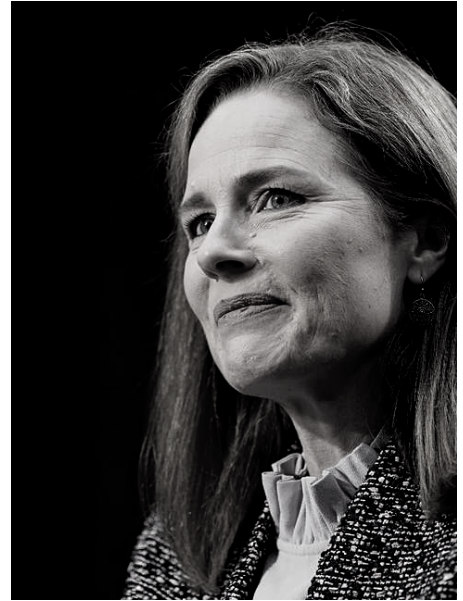
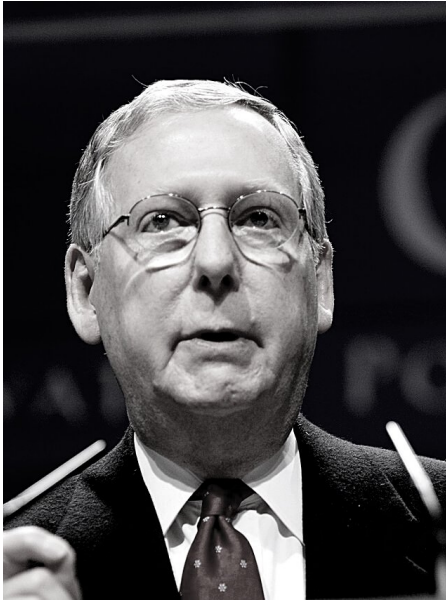
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## OVERVIEW

Last September, Senate Democrats issued a report describing how court capture by far-right dark money groups threatens millions of Americans' access to abortion and other reproductive care. We warned that Justice Amy Coney Barrett's rushed confirmation would put reproductive rights in jeopardy for a generation. One year later, those warnings have proven frighteningly accurate. Earlier this month, five Republican Justices voted in the dead of night to allow Texas's flagrantly unconstitutional abortion ban, S.B. 8, to take effect through the "shadow docket." As a result, almost all abortion care in Texas has come to an abrupt stop. Next term, in *Dobbs v. Jackson Women's Health Organization*, the Court will reconsider whether pre-viability abortion bans are constitutional, despite clear precedents settling that question. Even if the Court nominally leaves these precedents in place, it will almost certainly diminish their scope and effect.



With reproductive rights under direct attack, we must act. Congress must enact measures to protect abortion access, including by passing the Women’s Health Protection Act of 2021. We must also expose and combat the influence of special interest groups that have spent years stacking the courts with anti-abortion judges. Passing the Judicial Ads Act—now incorporated into the DISCLOSE Act, the For the People Act, and Freedom to Vote Act—would ensure greater transparency by requiring that groups that spend money on ads supporting or opposing judicial nominees disclose their donors. While it falls on Congress to pass these laws, all Americans committed to freedom, justice, and equality must join this urgent fight.

### **How did we get here?**

For decades, a network of dark money groups have invested tens of millions of dollars with the goal of overturning *Roe v. Wade* and *Planned Parenthood v. Casey*.<sup>1</sup> Koch-funded groups like **Concerned Women for America** (CWA), **Americans United for Life** (AUL), and the **Judicial Crisis Network** (JCN) have drafted anti-abortion legislation for state legislatures and funded ad campaigns to support the confirmation of anti-abortion judges and justices.<sup>2</sup>



Last year, this campaign culminated in Justice Amy Coney Barrett’s partisan confirmation to the Supreme Court just eight days before Republicans lost control of both the Senate and White House in the 2020 election. Dark-money groups spent tens of millions of dollars to jam her nomination through<sup>3</sup> because she is reliably anti-abortion.<sup>4</sup> Among others, **JCN** spent \$10 million, and Koch-backed **Americans for Prosperity** launched a “seven-figure” campaign supporting Justice Barrett’s confirmation.<sup>5</sup>



After stacking the federal judiciary with anti-abortion judges groomed and vetted by the far-right **Federalist Society**, anti-abortion groups have built a receptive audience for their campaign. They have made the most of it by crafting their most insidious anti-abortion law yet. Texas's S.B. 8, drafted by former Scalia clerk and Federalist Society lawyer Jonathan Mitchell,<sup>6</sup> bans abortion care after approximately six weeks into pregnancy. In order to evade constitutional protections and the judicial system, it outsources enforcement of the law to private parties by offering \$10,000 bounties for a successful suit against anyone who provides abortion care or helps a person seek an abortion in defiance of the law.<sup>7</sup>

***Texas's S.B. 8***  
*Outsources enforcement of the law to private parties by offering \$10,000 bounties for a successful suit against anyone who helps a person seek an abortion in defiance of the law.*

Prior to devising S.B. 8, Mitchell spearheaded anti-union litigation, working jointly with the **Freedom Foundation**, which is a member of **State Policy Network**.<sup>8</sup>



*Jonathan F. Mitchell*

As Supreme Court Justice Sonia Sotomayor noted, this law is “flagrantly unconstitutional” under existing Court precedents.<sup>9</sup> But anti-abortion judges on the 5th Circuit Court of Appeals and five Republican-appointed justices on the Court allowed the law to go into effect using the shadow docket. The move was so radical that not even Chief Justice Roberts—himself no friend of reproductive rights—would sign on.<sup>10</sup>

## ***The Shadow Docket***

The “shadow docket” refers to Supreme Court orders handed down outside of its typical “merits” docket. Unlike the merits docket, shadow docket orders are usually issued on limited timelines, with little time for briefs and without oral arguments. Shadow docket decisions are often unsigned, offer little to no explanation, and published in the dead of night. Historically, emergency requests made on the docket are intended to preserve the status quo while a case is working its way through the lower courts, but the Roberts Court has weaponized the shadow docket to disturb the status quo and allow harmful—and sometimes, irreversible—policies to take effect.

During the Trump administration, the Court repeatedly used the shadow docket to overturn lower court injunctions against the administration, and to speed up Trump’s priorities. Now that President Biden is in office, however, the Republican justices have changed their approach, deploying the shadow docket to gut constitutional rights—in this case, letting a plainly unconstitutional abortion ban go into effect. The Court spent less than three days dealing with the case. There were no oral arguments. The majority opinion was unsigned and one paragraph long. As Justice Kagan wrote in her dissent, the Court’s shadow docket decision making “every day becomes more unreasoned, inconsistent, and impossible to defend.”<sup>11</sup>

**“The majority’s decision is emblematic of too much of this court’s shadow-docket decision making — which every day becomes more unreasoned, inconsistent and impossible to defend.”**

*Justice Elena Kagan, dissenting in  
Whole Woman's Health v. Jackson*



## ***What Texas's Abortion Ban Means***

Texas has almost seven million women aged 15 to 49, out of a total of 75 million in the entire country, equaling one in 10 U.S. women of reproductive age.<sup>12</sup> S.B. 8 bans abortion care approximately six weeks into pregnancy, before many people even know they're pregnant—meaning abortion care has been pushed almost entirely out of reach for one in 10 U.S. women of reproductive age.

As we noted in our report last year, Republicans' sustained attacks on abortion access harm Americans' health outcomes, financial security, and ability to decide their life's course, especially for those who are struggling to make ends meet, those living in rural areas, and people of color. According to new research from the Guttmacher Institute, the average one-way driving distance for pregnant Texans seeking an abortion will now increase 14-fold, from 17 miles to 247 miles.<sup>13</sup> Given the additional costs associated with traveling out of state for care—including hotel stays, transportation, childcare, and lost wages, among others—this abortion ban will mean that many will not be able to get this care at all.


## ***What's Next & The Bigger Picture***

Even before the Texas case, state lawmakers, emboldened by the new makeup of the Supreme Court and the over 230 Trump-appointed federal judges, were rushing to enact more abortion restrictions. According to the Guttmacher Institute, over 500 abortion restrictions have been introduced this year across 47 states, and over 90 of those have already been passed and signed, including 11 bans on abortion.<sup>14</sup>

By allowing S.B. 8 to go into effect, the Court sent a signal about how little these justices respect reproductive rights, precedent, or “judicial restraint,” and just how far they will go to enact the agenda of the donors who put them on the Court. Already, Republican leaders in at least eleven states are looking to copy Texas's abortion ban.<sup>15</sup>





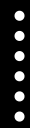


This term, the Republican justices are poised to further erode *Roe* and *Casey* in *Dobbs v. Jackson Women's Health Organization*. *Dobbs* involves a Mississippi law banning abortions after 15 weeks of pregnancy, in direct violation of the core holding of *Roe*, which protects a person's right to abortion prior to fetal viability. Mississippi's brief to the Court explicitly asks the Court to overrule *Roe* and *Casey*, a position loudly echoed by congressional Republicans. Mississippi's law was drafted by a group that is a member of **State Policy Network** and that has received significant funding from **Donors Capital Fund**, the "dark money ATM of the conservative movement" tied to the Koch family.<sup>16</sup> Groups such as **JCN** and Koch-backed **Americans for Prosperity** that spent millions to confirm Justices Gorsuch, Kavanaugh, and Barrett expect a return on their investment.<sup>17</sup>

### *What We Can Do*

Congress should act now to protect abortion access, including by passing the Women's Health Protection Act of 2021. This bill would establish a statutory right for health care professionals to provide abortion care and the right for their patients to receive care, free from bans and medically unnecessary restrictions that single out abortion care.

## The Women's Health Protection Act



*Establishes a **statutory right** for health care professionals to **provide abortion care** and the right for their patients to **receive care***

Congress should also pass measures, such as the Judicial Ads Act, to combat dark money-influence over judicial nominations. Groups like the **Federalist Society** and **Judicial Watch** have used a \$400 million judicial-influence machine to support right-wing policies and select judges.<sup>18</sup> The Judicial Ads Act would require identification of donors who fund advocacy campaigns aimed at confirming their favored nominees. Currently, anonymous money spent on judicial nominations is not subject to any disclosure requirements. Without more disclosure, the public has no way of knowing whether wealthy donors and groups advocating for certain policy changes are the same entities that are spending money to support or oppose a judicial nomination.

The time for warnings is over. Now is the time to act.

# ENDNOTES

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