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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 21-463, Whole Woman's Health versus Jackson.

Mr. Hearron.

ORAL ARGUMENT OF MARC A. HEARRON

ON BEHALF OF THE PETITIONERS

MR. HEARRON: Mr. Chief Justice, and may it please the Court:

In enacting Senate Bill 8, the Texas legislature not only deliberately prohibited the exercise of a constitutional right recognized by this Court, it did everything it could to evade effective judicial protection of that right in federal or state court.

Texas delegated enforcement to literally any person anywhere except its own state officials. The only conceivable reason for doing so was to evade federal court review under Ex parte Young.

Texas then created special rules applicable only to S.B. 8 claims that make it all but impossible to protect one's constitutional rights in state court. For a

1 single abortion, the law authorizes limitless  
2 suits in all 254 counties and provides that a  
3 victory in one has no preclusive effect in any  
4 other.

5 Texas incentivized enforcement through  
6 awards of at least \$10,000 per prohibited  
7 abortion against each defendant, without any  
8 showing of injury, and it added draconian  
9 one-sided fees provisions, with liability  
10 extended even to attorneys themselves.

11 The combined effect is to transform  
12 the state courts from a forum for the protection  
13 of rights into a mechanism for nullifying them.  
14 As Respondent Dickson has said, no rational  
15 abortion provider would violate this law.

16 While court clerks are not ordinarily  
17 proper defendants, in these circumstances, the  
18 principles underlying *Ex parte Young* authorize  
19 federal court relief against clerks. Their  
20 docketing of S.B. 8 suits, which is critical to  
21 effectuate Texas's illegal scheme, inflicts  
22 Article III injury in fact and is redressable by  
23 an order barring such docketing.

24 S.B. 8 is an abortion prohibition, but  
25 the issues before this Court are far more

1 sweeping. To allow Texas's scheme to stand  
2 would provide a roadmap for other states to  
3 abrogate any decision of this Court with which  
4 they disagree. At issue here is nothing less  
5 than the supremacy of federal law.

6 JUSTICE THOMAS: Counsel, you rely on  
7 Ex parte Young to some extent, but Ex parte  
8 Young makes clear that federal courts cannot  
9 enjoin state judges.

10 So how do you distinguish your case  
11 from the express language in Ex parte Young?

12 MR. HEARRON: Your Honor, the -- the  
13 language in Ex parte Young that I believe you're  
14 referring to discusses and -- and specifically  
15 allows an injunction against the commencement of  
16 the suit. And I -- and, Your Honor, I think,  
17 here, that supports an injunction against the  
18 clerks.

19 It distinguishes between restraining  
20 the commencement of a suit versus a -- a suit  
21 that -- after it has already been filed. So I  
22 think that that -- that language actually  
23 supports relief against the clerks here.

24 JUSTICE THOMAS: But --

25 MR. HEARRON: It's also premised, Your

1 Honor, on there being an executive official who  
2 you could enjoin. And, here, the state has  
3 intentionally taken away the executive  
4 officials.

5 JUSTICE THOMAS: But that's -- that's  
6 a -- that's what the case was about. It was  
7 about enforcing an action against a party.  
8 Hence, the case -- the focus is on enforcement,  
9 as opposed to adjudicating that enforcement.

10 And I don't think it really  
11 distinguishes it to say, well, this isn't about  
12 that. I mean, it expressly excludes enjoining a  
13 state court.

14 MR. HEARRON: Well, Your Honor, I  
15 think it -- it -- it -- it -- it excludes  
16 enjoining the court -- the -- a -- an action  
17 after it has already been filed, but it allows  
18 for -- it says that -- that there is the power  
19 to restrain the commencement of the suit.

20 And -- and I appreciate -- and I  
21 understand, Your Honor, that in that suit it was  
22 an injunction against the state official who was  
23 -- who was commencing the suit, but I don't  
24 think that it is -- I think the principles  
25 underlying *Ex parte Young*, which are to allow a

1 federal forum for the vindication of federal  
2 constitutional rights, would support an action  
3 here against the clerks to enjoin the  
4 commencement of the suit.

5 I also think that that language in Ex  
6 parte Young is not about sovereign immunity. It  
7 wasn't in the part of the -- the section of the  
8 opinion where the Court was addressing sovereign  
9 immunity. It was addressing a remedy that's  
10 available by courts in equity.

11 And, here, Section 1983 now provides  
12 that remedy, and it expressly allows suits  
13 against judges acting in their judicial  
14 capacity. But I don't think you need to reach  
15 the judges issue, Your Honor, because I think  
16 that language does support an injunction and the  
17 principles underlying Ex parte Young.

18 JUSTICE SOTOMAYOR: Counsel --

19 JUSTICE ALITO: You --

20 JUSTICE SOTOMAYOR: -- I read your  
21 complaint, and I thought you only asked for  
22 declaratory judgment against the judges and an  
23 injunction against the clerks.

24 Did I misread your complaint?

25 MR. HEARRON: No, you're -- you're



1 exactly right, Your Honor. We -- we sought --  
2 consistent with the text of Section 1983, we  
3 sought declaratory relief against judges and --  
4 and an injunction against the clerks, and I -- I  
5 think that --

6 JUSTICE SOTOMAYOR: So let's go to  
7 what the harm is that you're seeking an  
8 injunction against the clerks for.

9 Am I understanding correctly that you  
10 believe that the way this S.B. 8 is structured,  
11 that what the chilling effect is the very  
12 multiplicity of lawsuits that are threatened  
13 against you?

14 MR. HEARRON: Yes, Your Honor, that's  
15 exactly right. It is the fact -- there's a  
16 combination of various ways that the state has  
17 -- has created special rules applicable only to  
18 S.B. 8 to make state courts a -- a tool that can  
19 be used to nullify constitutional rights that  
20 have been recognized by this Court.

21 And I -- and I would point to -- I  
22 think there are four essential components of  
23 S.B. 8 that the legislature created.

24 First is it allows anyone to enforce,  
25 regardless of any injury.

1                   Second, it allows those suits to be  
2 brought anywhere in Texas, even for one  
3 abortion. So an abortion provider could face  
4 suits all across the state for a single  
5 abortion, multiplied by all the -- the  
6 additional abortions that are provided.

7                   And then there's no preclusive effect.  
8 Even if an abortion provider wins a case about  
9 that abortion, they still have to continue to  
10 face suit after suit after suit because there's  
11 no preclusive effect. It turns the -- the  
12 provider or the -- the abortion supporter into a  
13 permanent defendant --

14                   JUSTICE ALITO: Well, counsel, I don't  
15 want to --

16                   MR. HEARRON: -- for future use --

17                   JUSTICE ALITO: -- I don't want to  
18 interrupt your answer to Justice Sotomayor, but  
19 just to pick up on a point that you made, and  
20 maybe you could clarify this before you finish  
21 answering her question if you haven't finished  
22 already.

23                   Isn't it the case that the Texas  
24 constitution requires a plaintiff to show injury  
25 in fact in accordance with the same standard

1 that applies in federal court?

2 One of the first points you made, I  
3 think maybe the first point, was that S.B. 8  
4 allows anybody to sue, whether or not that  
5 person has suffered any injury.

6 Is that accurate under Texas law?

7 MR. HEARRON: I think the answer is  
8 unclear, and -- but in the -- in United States'  
9 case, in the preliminary injunction hearing,  
10 Texas, the -- the state -- the lawyer for the  
11 state told the district court that Texas law is  
12 quite different from federal law on the question  
13 of how standing and private interests versus  
14 public interests work. They said that at page  
15 49 of the transcript of the preliminary  
16 injunction hearing. And Texas courts --

17 JUSTICE ALITO: But hasn't the Texas  
18 Supreme Court said that they follow the same  
19 standard as the federal court? Haven't they  
20 said that?

21 MR. HEARRON: They said that recently,  
22 but Texas courts are not bound to follow this  
23 Court's precedents on Article III. They're not  
24 bound to follow --

25 JUSTICE ALITO: Well, of course,

1 they're not, but they are bound to follow the  
2 state supreme court, are they not?

3 MR. HEARRON: They are, but the Texas  
4 court has -- the Texas Supreme Court has never  
5 addressed a law like S.B. 8. And, clearly, the  
6 legislature thought that it could create  
7 standing by creating a cause of action and --  
8 and give everyone an injury.

9 But even if -- even if that's correct,  
10 even if an injury is required, it wouldn't stop  
11 uninjured people from filing suit, and it is the  
12 filing of the suit that is the point here. It  
13 is the -- the --

14 CHIEF JUSTICE ROBERTS: Well, counsel,  
15 the matters that you're talking about now,  
16 they're essential to your argument, right? You  
17 -- you agree that it would be adequate to have  
18 federal court review at the end of the state  
19 process but for the chilling effect that you're  
20 talking about, right?

21 MR. HEARRON: I think not in the way  
22 that S.B. 8 is structured. I mean, if there is  
23 review from this Court holding that the law is  
24 unconstitutional, that would be adequate. But I  
25 think that -- that there are a number --

1 CHIEF JUSTICE ROBERTS: Review at the  
2 end --

3 MR. HEARRON: -- of reasons --

4 CHIEF JUSTICE ROBERTS: -- review at  
5 the end of the day, right, when we have a final  
6 judgment from the state judiciary?

7 MR. HEARRON: But there are a number  
8 of reasons that that is unlikely to happen.

9 First of all, if -- if you win in the  
10 trial court, if the state trial court says that  
11 the law is unconstitutional, then getting  
12 broader relief depends on your opponents  
13 appealing that to the intermediate court through  
14 the Texas Supreme Court.

15 And the -- the proponents of this law  
16 are acting very strategically. They're --

17 CHIEF JUSTICE ROBERTS: Well, that's  
18 true in any case, right? I mean, if you get  
19 relief in a trial court and your opponent  
20 doesn't appeal, there's no real reason for you  
21 to seek relief in the Supreme Court, is there?

22 MR. HEARRON: But, in the normal case,  
23 if you win that case, if you -- if you win, then  
24 you don't have to continue litigating that.  
25 Here, S.B. 8 says there is no preclusive effect.

1 CHIEF JUSTICE ROBERTS: I know, you're  
2 getting back to the argument that there is a  
3 chilling effect. I'm asking --

4 MR. HEARRON: Yes.

5 CHIEF JUSTICE ROBERTS: -- for your  
6 position in the absence of that. If it's just a  
7 regular type of case, surely it's adequate to  
8 have federal review at the end of the state  
9 court process.

10 MR. HEARRON: In the normal case, yes,  
11 you are -- that is correct. I agree with that,  
12 that, you know, under a normal tort lawsuit,  
13 that is adequate. It is the chilling effect  
14 that is -- that in this case is created by the  
15 combination of delegation of -- of enforcement  
16 of a public policy to the general public at  
17 large, and there's no preclusive effect.

18 And -- and all of the special rules  
19 that are created in order to turn the Texas  
20 state courts into a tool that can be used to  
21 nullify --

22 JUSTICE BARRETT: Counsel --

23 MR. HEARRON: -- the exercise of  
24 rights --

25 JUSTICE BARRETT: -- even apart from

1 these procedural requirements that you're  
2 talking about, I'm wondering if, in a defensive  
3 posture in state court, the constitutional  
4 defense can be fully aired?

5           And I'm wondering that for this  
6 reason: The statute says that "A defendant may  
7 not establish an undue burden" -- and this is  
8 even assuming that the defendant sat -- can  
9 satisfy third-party standing rules because the  
10 statute says it has to be Craig versus Boren,  
11 not the regular abortion third-party standing  
12 rules -- but it says that: "A defendant may not  
13 establish an undue burden under this section by"  
14 -- and this is (d)(2) in this section --  
15 "arguing or attempting to demonstrate that an  
16 award of relief against other defendants or  
17 other potential defendants will impose an undue  
18 burden on women seeking an abortion."

19           So I take that to mean that a  
20 defendant can only say, an award against me  
21 would place a substantial obstacle. And that's  
22 not the full constitutional holding of either  
23 Whole Woman's Health or June Medical. It's  
24 looking at the law as a whole and its deterrent  
25 effect.

1 Do you read that the same way?

2 MR. HEARRON: I -- I completely agree,  
3 Your Honor, yes.

4 JUSTICE BARRETT: So, if that's the  
5 case, the full constitutional defense cannot be  
6 asserted in the defensive posture. Am I right?

7 MR. HEARRON: I -- I think that's  
8 right, Your Honor, that the -- and the -- and  
9 the title of that section that you're -- that  
10 you're referencing is called Limitations on  
11 Undue Burden Defense.

12 Clearly, it's not only the procedural  
13 rules, that the Texas legislature has tried to  
14 change the substantive rules that this Court  
15 applies to protect the -- the --

16 JUSTICE ALITO: Well, wouldn't --

17 JUSTICE BARRETT: So does that mean  
18 you cannot get full review even on the back end  
19 if it goes up through the Texas Supreme Court  
20 and up to us the way the statute is structured?

21 MR. HEARRON: We would have an  
22 argument, Your Honor, and -- and we would  
23 obviously make the argument that that provision  
24 of the Texas law is -- is unconstitutional  
25 because it conflicts with this Court's



1 precedence in -- in Casey, but -- but, Your  
2 Honor, it's unclear exactly how the Texas courts  
3 would apply that, whether they would follow the  
4 undue burden standard.

5 And, clearly, what the legislature was  
6 trying to do was to -- to limit the undue burden  
7 defense --

8 JUSTICE ALITO: Well, wouldn't they be  
9 --

10 MR. HEARRON: -- and make it more  
11 difficult.

12 JUSTICE ALITO: -- wouldn't they be  
13 obligated under the supremacy clause to apply  
14 the federal Constitution as opposed to a  
15 provision of a state statute that purports to  
16 preclude them from considering a constitutional  
17 claim?

18 MR. HEARRON: They -- they would, Your  
19 Honor, but --

20 JUSTICE ALITO: So then your argument  
21 is that they would not follow -- they would not  
22 abide by the Constitution?

23 MR. HEARRON: I'm -- I'm not  
24 suggesting that they would not abide by the  
25 Constitution. What I'm saying is that even if

1 you have to prove that undue burden defense in  
2 every single case, it is -- you -- you -- we  
3 wouldn't say -- and if the law -- if the State  
4 of Texas had passed a law making it a criminal  
5 violation to provide an abortion after six  
6 weeks, that there's no problem because you can  
7 simply raise undue burden at trial, at your  
8 criminal trial.

9 This Court's precedents allow  
10 pre-enforcement relief, allow you to come into  
11 court and say, I don't need to violate the law  
12 in order to first raise my constitutional  
13 defenses. I can come into court under Ex parte  
14 Young and Section 1983 and seek a ruling that my  
15 -- my constitutional --

16 JUSTICE SOTOMAYOR: Counsel --

17 MR. HEARRON: -- rights are being  
18 violated.

19 JUSTICE SOTOMAYOR: -- we have laws  
20 that preclude the enforcement of judgments in  
21 which process has been denied, where you're not  
22 given an opportunity to air your claims.

23 Justice Barrett pointed out to a  
24 provision of this law that says you can't  
25 present this claim this way, all right? Whether

1 the judge -- what the judges will do is  
2 irrelevant.

3 I thought the essence of your argument  
4 was that the law as law is precluding you from  
5 using the judicial system as a neutral  
6 arbitrator.

7 MR. HEARRON: That's right, because  
8 even if we raise a successful undue burden  
9 defense in -- in one case, you have to do it  
10 again in case after case after case.

11 JUSTICE SOTOMAYOR: Well, it doesn't  
12 really matter. The point is --

13 MR. HEARRON: The --

14 JUSTICE SOTOMAYOR: -- that it's not  
15 -- it's not a neutral arbitrator. It's an  
16 enforcer being tried -- being used as an  
17 enforcer of --

18 MR. HEARRON: I -- I agree with that,  
19 Your Honor, and -- but -- but, Your Honor, here,  
20 the -- the point is that regardless of the  
21 outcome of the case, it is the threat of filing  
22 an unlimited number of cases in county -- in  
23 counties all across the state where there is no  
24 preclusive effect and where the state has even  
25 made it so -- more difficult to get an attorney

1 by making attorneys liable for fees -- for the  
2 other side's fees --

3 JUSTICE KAVANAUGH: Mr. Hearron --

4 MR. HEARRON: -- that all of that  
5 creates a threat. Yes, Your Honor.

6 JUSTICE KAVANAUGH: Keep going.  
7 Sorry.

8 MR. HEARRON: The -- I was just going  
9 to say the -- the combination of all of those  
10 factors together creates a chilling effect that  
11 is preventing the exercise, and that is under  
12 this Court's precedence an -- a -- an  
13 irreparable injury.

14 JUSTICE KAVANAUGH: Could we talk  
15 about Ex parte Young a little bit? You make the  
16 point correctly that usually you can get  
17 pre-enforcement review in federal court when  
18 it's enforced, a law is enforced by a state  
19 prosecutor or a state executive official.  
20 That's longstanding law.

21 The issue here is different because  
22 it's private enforcement in state courts, and  
23 that raises a novel issue for us about how to  
24 apply Ex parte Young.

25 The Ex parte Young principle is that

1 those who enforce the law can be enjoined or can  
2 be sued in pre-enforcement suits in federal  
3 court. But, as Justice Thomas points out, in  
4 the two paragraphs at the top of page 163 of Ex  
5 parte Young, state courts seem to be carved out  
6 from that.

7 So that's the tension. I think you  
8 identified it. The principle of Ex parte Young  
9 versus the language at the top of 163, for me,  
10 that's been a real sticking point in trying to  
11 sort this out.

12 Now one -- one answer you didn't give  
13 is that subsequent law says that when state  
14 courts entertain private civil suits, they  
15 enforce state law. And I wanted -- Shelley  
16 versus Kraemer being the most prominent landmark  
17 example of that.

18 So can you fill in the gaps there and  
19 explain to me how we should think about the Ex  
20 parte Young language in light of how we  
21 conceptualize state court enforcement of private  
22 civil suits now?

23 MR. HEARRON: Yes, Your Honor. So I  
24 think -- I think that the most straightforward  
25 way to apply Ex parte Young or to allow relief

1 here under Ex parte Young is against the clerks,  
2 as I've said, because that would stop the  
3 commencement of the suits and wouldn't create  
4 any of the problems raised in Ex parte Young  
5 itself about stopping the -- the adjudication.

6 But --

7 JUSTICE KAVANAUGH: So I think --  
8 sorry to interrupt --

9 MR. HEARRON: No.

10 JUSTICE KAVANAUGH: -- but I think  
11 Justice Thomas's question was also getting at,  
12 though -- at -- I take the point distinguish the  
13 judges from the clerks. Are the clerks subsumed  
14 within that language in Ex parte Young, and  
15 you're saying we shouldn't do that? And I just  
16 want to hear your answer why shouldn't we do  
17 that.

18 MR. HEARRON: That's right, I don't  
19 think so, because that language distinguishes  
20 between the power to restrain commencement of  
21 suits, which I think that language actually  
22 supports relief against the clerks, versus  
23 whether courts should restrain a case brought  
24 before it. Now -- which would -- which would  
25 mean that that's -- that would refer to the --

1 the judges here.

2 Now I do think, in subsequent  
3 precedent -- decisions of this Court, you're  
4 correct, there are -- there are instances where  
5 the Court has recognized in Pulliam and in  
6 Mitchum where relief against state judges --  
7 and, in fact, Congress recognized in Section  
8 1983, in the text of Section 1983, that judges  
9 can be proper defendants, and we've brought that  
10 declaratory relief, but I think --

11 JUSTICE KAVANAUGH: Well, it's -- it's  
12 more than just that, frankly, because Ex parte  
13 Young depends on enforcement. I think that's  
14 the key word. Well, it turns out in Shelley  
15 versus Kraemer the word "enforcement" is in  
16 there, by my count, 27 times, give or take a  
17 couple, to describe what state courts do when  
18 they adjudicate private civil suits.

19 MR. HEARRON: That's right, and, in  
20 fact, Judge Jackson at a press conference said  
21 he's the enforcer of the laws in east Texas.  
22 And -- and I think that that's clearly -- it's  
23 clearly correct that when the court issues an  
24 injunction, a mandatory injunction, or issues  
25 them monetary penalties, what the court is doing

1 is enforcing S.B. 8.

2 JUSTICE ALITO: A judge may be  
3 enforcing a state law when the judge renders a  
4 decision based on that state law and provides  
5 relief based on that state law. But do you  
6 think a judge is enforcing a law when the judge  
7 merely begins to adjudicate the case?

8 MR. HEARRON: I think one way of  
9 potentially looking at it is that by requiring  
10 -- so, yes, in a -- in a sense. And one way of  
11 looking at it is that by requiring litigants to  
12 be in court and -- and requiring them to make  
13 filings and appear in court, it would --  
14 because, here, it would be multiplied in courts  
15 --

16 JUSTICE ALITO: I mean, really?

17 MR. HEARRON: -- in courts across the  
18 state --

19 JUSTICE ALITO: I mean, suppose --

20 MR. HEARRON: -- if that's --

21 JUSTICE ALITO: -- a legislature  
22 enacted a statute that said henceforth people of  
23 a certain race may not make any public  
24 statement, and someone brings suit under that.  
25 The judge begins to enforce that just by



1 entertaining the suit?

2 MR. HEARRON: I think, in --

3 JUSTICE ALITO: Even --

4 MR. HEARRON: -- in certain  
5 circumstances --

6 JUSTICE ALITO: -- even if it's  
7 certain that at the end of the case the judge is  
8 going to say no, this is an invalid -- this is  
9 an unconstitutional statute?

10 MR. HEARRON: I think, in certain  
11 circumstances, that even the -- in a -- in a  
12 situation like S.B. 8, where the point is the  
13 filing of the suit and the point is the making  
14 you appear in courts all across the state over  
15 and over again, making you a permanent  
16 defendant, that --

17 JUSTICE BREYER: Who --

18 MR. HEARRON: -- in these -- in these  
19 circumstances -- yes, I'm sorry, Justice Breyer.

20 JUSTICE BREYER: Who -- were you  
21 finished with -- because I'm -- I'm taking up  
22 his argument why -- what -- what -- look, you --  
23 you -- you say a judge is at least in many  
24 circumstances an enforcer. There are 4 billion  
25 tort suits in the United States, okay? And

1 probably, in 3 billion of them, somebody thinks  
2 something is unconstitutional, all right? So  
3 can they all sue the judge?

4 MR. HEARRON: No, Your --

5 JUSTICE BREYER: Everybody goes into  
6 federal court and sues the judge?

7 MR. HEARRON: No, Your Honor.

8 JUSTICE BREYER: And in state court?  
9 All right. What's the difference between this  
10 case, where you think he's an enforcer, and 4  
11 billion other cases, where -- you've read their  
12 briefs, all right, you understand their  
13 argument. What's your response to it?

14 MR. HEARRON: That -- the response is  
15 that under the rule that we are advancing here  
16 is that where a state is trying to nullify the  
17 exercise of a right, a constitutional right  
18 that's been recognized by this Court, by  
19 delegating enforcement to the public and taking  
20 away the -- the normal ordinary executive  
21 officials and then also creating special court  
22 rules, I -- in order to -- to turn the court  
23 system -- I -- I -- we're not -- we're not  
24 saying that judges or clerks are intending to do  
25 anything here, but -- but it's the rules that

1 have been created by the Texas legislature that  
2 turn courts into a weapon that can be used to  
3 nullify constitutional rights.

4 CHIEF JUSTICE ROBERTS: You might  
5 appreciate that the idea of suing the judges  
6 sort of got our attention, but is there even --  
7 is there even a case or controversy in such a  
8 suit?

9 I understand the position of the -- of  
10 the plaintiff, exactly what he or she wants.  
11 The judge is not necessarily adverse to that.  
12 The judge's role is to issue a decision. The  
13 idea of someone who's going to decide a  
14 question, that person is not automatically  
15 adverse to the person who asked the question.  
16 And that seems to me to raise a real problem  
17 under the case or controversy requirement.

18 MR. HEARRON: So I think there is a  
19 case or controversy, and if I could address the  
20 clerks first, that there -- there's adversity in  
21 a case or controversy against the clerks, Your  
22 Honor, because the clerks are saying they have a  
23 duty under state law to docket a petition, to --  
24 to issue summonses. And we are saying that  
25 the -- even the initiation of an enforcement

1 proceeding violates constitutional rights and  
2 that they should not docket. That is adversity.  
3 It doesn't matter whether the clerks agree with  
4 the law or want to defend the law.

5 JUSTICE ALITO: I mean, the clerk --

6 MR. HEARRON: That alone is the --

7 JUSTICE ALITO: -- a clerk performs a  
8 ministerial function. Somebody shows up with a  
9 complaint, wants to file a complaint, and  
10 assuming the formal requirements are met, the  
11 clerk files the complaint. The clerk doesn't  
12 have the authority to say, you can't file this  
13 complaint because it's a bad complaint.

14 I mean, what if the judge, the  
15 presiding judge in a particular jurisdiction,  
16 said, okay, fine, you don't want the clerks  
17 filing these things, if anybody shows up with an  
18 S.B. 8 complaint, call me and I'll docket it  
19 myself? Then what?

20 MR. HEARRON: Well, Your Honor, that's  
21 -- that's why we've asked for declaratory relief  
22 against the judges, but I think that -- I do  
23 think --

24 JUSTICE ALITO: Well, you've got to  
25 get to the judges.

1                   MR. HEARRON:  -- that relief against  
2                   the clerks --

3                   JUSTICE ALITO:  This business about  
4                   the clerks is a, you know --

5                   MR. HEARRON:  No, I do think that  
6                   relief against the clerks, Your Honor, would --  
7                   would alleviate most of the harm and would thaw  
8                   the chill and would allow abortion providers to  
9                   understand -- and -- and, in fact, the  
10                  ministerial nature of their docketing is exactly  
11                  what makes them a proper defendant here.  We  
12                  know that clerks will docket every S.B. 8  
13                  petition that is brought forward.

14                  And the state has encouraged and it  
15                  has incentivized enforcement by offering \$10,000  
16                  or more bounties, effectively, and by lowering  
17                  the barriers of entry for people across the  
18                  state, by allowing anyone to sue without having  
19                  to show an injury, by allowing them to sue in  
20                  their home county, and to not have to worry  
21                  about paying the other side's attorney's fees  
22                  and even get their own attorney's fees paid.

23                  So we know there will be enforcement,  
24                  and the ministerial act of the clerk's docketing  
25                  is exactly what the -- the state has made the

1 clerks an essential role in the -- in this  
2 machinery that they have created to nullify  
3 constitutional rights that have been recognized  
4 by this Court.

5 JUSTICE BARRETT: Counsel, are you  
6 arguing that there's a constitutional right to  
7 pre-enforcement review? And, if so, how do you  
8 reconcile that with Sheldon versus Sill?

9 MR. HEARRON: So our -- our first  
10 argument is actually that Congress created the  
11 right in Section 1983.

12 JUSTICE BARRETT: Assume we don't go  
13 -- assume I don't buy that.

14 MR. HEARRON: So I think that, yes,  
15 there is, and Ex parte Young recognized that in  
16 these circumstances, where it's not going to be  
17 -- where the penalties are so severe and where  
18 there is -- it's -- it's difficult to find  
19 someone who is willing to even violate the law  
20 for a test case, I think Ex parte Young  
21 addressed all of that and said that, in fact,  
22 there is a -- a procedural due process  
23 violation.

24 JUSTICE BARRETT: It's -- okay. It --  
25 I -- I think there is language in Ex parte Young

1 that favors you. And I don't think Thunder  
2 Basin -- I think Thunder Basin assumes that  
3 there might be some circumstances in which  
4 pre-enforcement review is constitutionally  
5 required.

6 In this context, presumably, that  
7 might happen in state courts? Even if there is  
8 some sort of constitutional right to  
9 pre-enforcement review, need it be provided by a  
10 federal court?

11 MR. HEARRON: I'm sorry, I missed the  
12 last part of your question.

13 JUSTICE BARRETT: If there is a  
14 constitutional right to pre-enforcement review,  
15 on your reading of *Ex parte Young*, does it have  
16 to be provided by a federal court?

17 MR. HEARRON: I think *Ex parte Young*  
18 does support in federal court, yes, in -- in  
19 part because state court review in circumstances  
20 like in *Young* and here is inadequate for a  
21 number of reasons that I -- that I'm happy to  
22 get into.

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 counsel.

25 Justice Thomas, anything further?

1 JUSTICE THOMAS: No, Chief.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Breyer?

4 JUSTICE BREYER: I'd like to just be  
5 sure I have this. Your basic point I take it  
6 here at this -- as we've discussed it, is this  
7 kind of a private lawsuit is not an ordinary  
8 tort suit. Okay? So I've tried to write down  
9 the reasons, and I want you to add anything I  
10 leave out.

11 One, anybody can sue. Well, okay.  
12 Debatable. Two, anywhere in Texas. Texas is a  
13 bigger problem than Rhode Island there. Three,  
14 it has no preclusive effect. Jones 1 sues the  
15 clinic. Clinic wins. Jones 2 through 4,000 can  
16 sue. Four, the attorney's fees are very heavy.  
17 Five -- and they don't apply both ways. Five,  
18 the penalty of \$10,000, et cetera, is heavy.  
19 And, six, you are limited if you are a defendant  
20 as to which kinds of defense you can make in  
21 respect to there being an undue burden, which is  
22 a problem because most of the undue burden cases  
23 speak generally of the effect of the law of the  
24 state, not on this particular defendant. Okay?

25 I have six that I caught from you. Is



1       there a seventh?

2                   MR. HEARRON: I have two more, Your  
3 Honor.

4                   JUSTICE BREYER: Okay.

5                   MR. HEARRON: The first is that  
6 damages are not tied to the amount of any harm,  
7 which would be normally the case in a tort suit.

8                   And the -- the second one is that S.B.  
9 8 provides for a mandatory injunction, if there  
10 is a successful claimant, to prevent further  
11 violations, not to prevent further harm to the  
12 claimant. It's -- it's not tied to -- the --  
13 the mandatory injunction is not tied to the  
14 harm.

15                   JUSTICE BREYER: Thank you.

16                   CHIEF JUSTICE ROBERTS: Justice Alito?

17                   JUSTICE ALITO: Suppose that --  
18 suppose this happens: A woman shows up at the  
19 clerk's office and says, I want to file a pro se  
20 complaint against the doctor who performed my  
21 abortion because it caused me physical and/or  
22 emotional harm and I want to sue under S.B. 8  
23 because I want actual damages, but I also want  
24 the \$10,000 in liquidated damages.

25                   And you say the clerk should say what?

1           MR. HEARRON: The clerk should reject  
2 the filing of that lawsuit.

3           JUSTICE ALITO: Thank you.

4           CHIEF JUSTICE ROBERTS: Justice  
5 Sotomayor?

6           JUSTICE SOTOMAYOR: I presume that any  
7 other lawsuit based on common law torts --  
8 emotional infliction of harm, breach of  
9 contract, medical malpractice, whatever else was  
10 available -- would still be available to that  
11 woman?

12          MR. HEARRON: If there is a common law  
13 tort lawsuit that -- that is not an S.B. 8  
14 lawsuit, yes.

15          JUSTICE SOTOMAYOR: Contract or  
16 otherwise, common law tort or contract?

17          MR. HEARRON: Yes.

18          JUSTICE SOTOMAYOR: Thank you.

19          CHIEF JUSTICE ROBERTS: Justice Kagan?

20          JUSTICE KAGAN: Mr. Hearron, if I  
21 could turn technical for a minute. Should one  
22 of your arguments prevail or another argument in  
23 support of your position prevail -- it doesn't  
24 matter exactly which argument it is to me --  
25 what exact relief are you requesting?

1           MR. HEARRON: We are requesting an  
2 injunction. So we have a -- a pending class  
3 certification motion for a defendant class  
4 against the clerks, so we would be requesting an  
5 injunction against the commencement -- or the  
6 docketing of lawsuits against the clerks of the  
7 -- across the State of Texas, as well as  
8 injunctive relief against the state executive  
9 officials for their residual authority to  
10 enforce S.B. 8.

11           JUSTICE KAGAN: I mean, suppose I  
12 think -- I mean, tell me if I'm wrong on this,  
13 that just the procedural morass we've got  
14 ourselves into with this extremely unusual law  
15 is that we would really be telling the Fifth  
16 Circuit, again, if your position prevailed, that  
17 the district court had to be allowed to continue  
18 with its preliminary injunction ruling.

19           Is -- is that correct? Is that what  
20 we would be doing?

21           MR. HEARRON: I think, technically,  
22 what you would be doing is affirming the  
23 district court's denial of the Respondents'  
24 motion to dismiss, which would then allow us to  
25 proceed to our pending preliminary injunction

1 motion and pending summary judgment motion and  
2 pending class certification motion.

3 JUSTICE KAGAN: Yeah. And while the  
4 district court does all that, which we're --  
5 which we would be saying the district court  
6 should go do, do you -- have you made a motion  
7 for interim relief?

8 I mean, I know that there's a motion  
9 for interim relief in the United States versus  
10 Texas case, but, if you were to prevail, we  
11 wouldn't even have to rule on the United States  
12 versus Texas case. You know, we could -- that's  
13 very complicated for other reasons. We could  
14 just sort of leave that be.

15 But -- but -- but -- but the in -- the  
16 motion for interim relief is in that case, not  
17 in your case. Am -- am I wrong about that, or  
18 do you have a motion in your case that would  
19 enable interim relief?

20 MR. HEARRON: We haven't filed such a  
21 motion, but I would ask the Court now that if --  
22 if it is not going to reinstate the injunction  
23 in the United States' case, that it issue  
24 interim relief now against enforcement because  
25 the law is patently unconstitutional, and if

1 these are the correct defendants, then -- then  
2 enforcement should -- should flow.

3 So we would ask the Court to -- to  
4 issue such interim relief.

5 JUSTICE KAGAN: Thank you, Mr.  
6 Hearron.

7 JUSTICE SOTOMAYOR: Would the Chief  
8 permit me a follow-up on that?

9 CHIEF JUSTICE ROBERTS: Sure.

10 JUSTICE SOTOMAYOR: Counsel, if we  
11 vacate the Fifth Circuit's order -- orders,  
12 basically staying the district court  
13 proceedings, presumably, that would vacate its  
14 denial of the stay that you had asked from the  
15 district court order. If we reinstated the  
16 district court order, you would have a stay in  
17 place, wouldn't you?

18 MR. HEARRON: So -- so, technically,  
19 there are two stays in place, one that was  
20 issued by the district court and one that was  
21 issued by the Fifth Circuit.

22 And if you were to vacate those stays,  
23 in the interim, then we would be able to go back  
24 to the district court and ask for a -- you know,  
25 an -- interim relief in the -- in the district

1 court.

2 JUSTICE SOTOMAYOR: But were you  
3 granted a stay of enforcement of the law?

4 MR. HEARRON: Were we granted --

5 JUSTICE SOTOMAYOR: By the district  
6 court?

7 MR. HEARRON: We -- we have never  
8 gotten to that point, Your Honor.

9 JUSTICE SOTOMAYOR: Ah, okay. Thank  
10 you.

11 MR. HEARRON: Yes. We -- we did not  
12 get --

13 JUSTICE SOTOMAYOR: I forgot.

14 MR. HEARRON: We --

15 JUSTICE SOTOMAYOR: Thank you.

16 MR. HEARRON: Yeah.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Gorsuch?

19 JUSTICE GORSUCH: I do have a couple  
20 of questions. On -- on -- on chilling effect,  
21 do you agree that other laws often have chilling  
22 effects on the exercise of constitutionally  
23 protected rights that can only be challenged  
24 defensively?

25 MR. HEARRON: Not to this extent,

1       yeah, but there may --

2                   JUSTICE GORSUCH:   But do you agree  
3       that there are laws -- defamation laws, gun  
4       control laws, rules during the pandemic about  
5       the exercise of religion -- that discourage and  
6       chill the exercise of constitutionally protected  
7       liberties?

8                   MR. HEARRON:   Yes.

9                   JUSTICE GORSUCH:   And that they can  
10       only be challenged after the fact?

11                   MR. HEARRON:   I'm not sure that they  
12       -- that all of those laws could only be  
13       challenged after the fact, but there may be  
14       some, Your Honor.

15                   JUSTICE GORSUCH:   Certainly, there are  
16       certain -- certain circumstances where that's  
17       true, right?

18                   MR. HEARRON:   That's probably correct.

19                   JUSTICE GORSUCH:   Okay.   So it's a  
20       line-drawing between those cases and your case  
21       --

22                   MR. HEARRON:   Yes.

23                   JUSTICE GORSUCH:   -- in your -- in  
24       your mind?   Okay.   And then, on -- on -- on the  
25       relief, am I understanding you correctly that --

1 that relief against the clerks, you think, is  
2 sufficient for your purposes?

3 MR. HEARRON: I think that it is -- it  
4 would go most of the -- of the way to getting  
5 the relief that -- that we need in order for  
6 abortion providers to begin providing again. We  
7 -- we do think that it is also appropriate for a  
8 declaratory judgment against the judges, but I  
9 think that the clerks -- that relief --

10 JUSTICE GORSUCH: Okay.

11 MR. HEARRON: -- against the clerks  
12 would --

13 JUSTICE GORSUCH: So if that --

14 MR. HEARRON: -- be sufficient.

15 JUSTICE GORSUCH: -- if that -- and --  
16 and -- and -- and you agreed previously they're  
17 under obligation under state law to file  
18 everything that comes in without looking at its  
19 contents or judging its contents, right?

20 MR. HEARRON: Yes, although I think  
21 that there are circumstances in which, for  
22 example, a -- a judge may direct that a  
23 particular person may not file because they have  
24 filed too many frivolous lawsuits, for example.  
25 There are --



1 JUSTICE GORSUCH: But that's pursuant  
2 to an -- a judicial order?

3 MR. HEARRON: Yes.

4 JUSTICE GORSUCH: But, otherwise,  
5 they're obliged to file everything that comes  
6 their way?

7 MR. HEARRON: Yes.

8 JUSTICE GORSUCH: Okay. And so --

9 MR. HEARRON: And -- and -- and that's  
10 --

11 JUSTICE GORSUCH: -- you'd say the  
12 Constitution overrides that requirement in this  
13 case?

14 MR. HEARRON: Yes, we believe so, Your  
15 Honor.

16 JUSTICE GORSUCH: Okay. And what  
17 about the cases where S.B. 8 could be  
18 constitutionally applied, consistent with Roe  
19 and Casey? Should they file those lawsuits?  
20 Should they try and determine whether -- which  
21 side of the line they fall on? I mean,  
22 post-viability, not for medical reasons, you  
23 know, that would meet a Roe and Casey test? Are  
24 they supposed to apply Roe and Casey themselves?

25 MR. HEARRON: I -- I don't think --

1 no, I -- I think that they should be enjoined  
2 from docketing any S.B. 8 lawsuits because S.B.  
3 8, we believe, is --

4 JUSTICE GORSUCH: Including  
5 constitutional ones?

6 MR. HEARRON: But -- but I -- I think  
7 that that is -- that would -- the existence of  
8 those claims is not chilling the exercise of  
9 constitutional rights here, so -- but I do --

10 JUSTICE GORSUCH: Exactly.

11 MR. HEARRON: -- but I --

12 JUSTICE GORSUCH: But you'd enjoin  
13 them anyway?

14 MR. HEARRON: But I do -- yes, because  
15 -- and -- and that's consistent with the relief  
16 that has -- that --

17 JUSTICE GORSUCH: And if -- and if a  
18 clerk goes -- goes ahead and docketes a -- a  
19 permissible non-chilling petition, a federal  
20 judge could find him in contempt and -- and --  
21 and put him in jail, right?

22 MR. HEARRON: I think that would be --  
23 there's -- there's standards for criminal due  
24 process -- there are due process standards for  
25 criminal --

1 JUSTICE GORSUCH: But subject to those  
2 due process standards?

3 MR. HEARRON: Subject to those  
4 standards, but I think that those would be  
5 extremely difficult --

6 JUSTICE GORSUCH: Thank you.

7 MR. HEARRON: -- you know, to meet for  
8 the most part. And we -- we -- we believe that  
9 clerks will -- will follow the -- the injunction  
10 in good faith.

11 CHIEF JUSTICE ROBERTS: Justice  
12 Kavanaugh?

13 JUSTICE KAVANAUGH: A couple  
14 follow-ups to Justice Kagan's question. I think  
15 you also had a pending TRO in the district court  
16 with the preliminary injunction --

17 MR. HEARRON: Yes.

18 JUSTICE KAVANAUGH: -- and the class  
19 certification. Is that accurate?

20 MR. HEARRON: Yes.

21 JUSTICE KAVANAUGH: Okay. And then,  
22 to follow up on the Chief Justice's question,  
23 which I think reflects, from my viewpoint, a  
24 change in your reply brief or maybe -- I don't  
25 want to say "change" -- shift in focus in the

1 reply brief to the clerks from the judges and  
2 clerks.

3           And if I'm understanding you  
4 correctly, you're saying that Ex parte Young  
5 principle should apply to both, but the  
6 adverseness issue may be more serious with  
7 judges, and, therefore, you focused on the  
8 clerks. Is that -- that's how I read your reply  
9 brief, because it was noticeable to me.

10           MR. HEARRON: I think that's -- that's  
11 right, Your Honor, that -- that it is -- it is  
12 easier to say that we are adverse to clerks  
13 because the -- the filing of the lawsuits, which  
14 is the point here, to create the in terrorem  
15 effect and to chill the constitutional rights is  
16 the filing of the lawsuits, and that creates a  
17 sharp adversity to the clerks, who are just  
18 performing their ministerial duty and not  
19 adjudicating anything.

20           JUSTICE KAVANAUGH: Okay. And then  
21 last, to follow up on Justice Breyer's question,  
22 he mentioned the floodgates issue which the  
23 state will -- has raised. And, obviously, there  
24 are already a lot of Ex parte Young suits in  
25 federal court to enjoin the usual state laws

1 that are assertedly unconstitutional, but the  
2 claim by Texas is that this will increase the  
3 load. I'll give you another chance to respond  
4 to that.

5 MR. HEARRON: I don't think that's  
6 correct. It -- this is an exceptional -- this  
7 is unprecedented, and under the principle that  
8 we're advancing, it would not allow suits  
9 against clerks to challenge most laws.

10 This is a unique law, created because  
11 the state has delegated enforcement and has  
12 taken away the -- the normal executive officials  
13 who would enforce and has weaponized the state  
14 court system into a tool that can be used to  
15 abrogate constitutional rights. So this is a  
16 unique situation.

17 I think the real danger is, if this  
18 Court does not allow this suit, then that will  
19 provide a roadmap for other states to abrogate  
20 other rights that have been recognized by this  
21 Court.

22 JUSTICE KAVANAUGH: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Barrett?

25 JUSTICE BARRETT: No.

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 General Stone.

4 ORAL ARGUMENT OF JUDD E. STONE, II,  
5 ON BEHALF OF THE RESPONDENTS

6 MR. STONE: Thank you, Mr. Chief  
7 Justice, and may it please the Court:

8 Petitioners' pursuit of an injunction  
9 suffers from two fundamental problems.

10 First, none of the individuals that  
11 Petitioners sued are appropriate defendants  
12 under well-established Article III and equitable  
13 principles.

14 Second, Petitioners ask for an  
15 expansion of access to the federal courts that  
16 only Congress and not this Court may provide.

17 Petitioners' Article III and equitable  
18 problems begin with what they really want, an  
19 injunction against S.B. 8, the law, itself.  
20 They can't receive that because federal courts  
21 don't issue injunctions against laws but against  
22 an -- but against officials enforcing laws. No  
23 Texas executive official enforces S.B. 8 either,  
24 and so no Texas executive official may be  
25 enjoined.

1           Petitioners then turned to state court  
2 judges and state court clerks and, apparently,  
3 in this Court, now narrow their focus to state  
4 court clerks. But even they don't suggest that  
5 either judges or clerks act unlawfully in the  
6 ordinary course by adjudicating a case or  
7 receiving a complaint. So Petitioners' harms  
8 are not fairly traceable to any unlawfully -- to  
9 any allegedly unlawful behavior by state court  
10 judges or clerks.

11           And this Court recognized in *Ex parte*  
12 *Young* itself that such an injunction would be a  
13 violation of the whole scheme of our government.  
14 State judges are presumed to faithfully apply  
15 federal law and this Court's decisions. If they  
16 do not, this Court may exercise appellate  
17 review. That is exactly how federal  
18 constitutional defenses are presented and  
19 adjudicated all the time.

20           If Congress believes it needs to  
21 expand access to the lower federal courts in  
22 order to protect Petitioners' rights, then that  
23 is a matter for Congress, not a basis to alter  
24 -- to alter bedrock doctrines organizing the  
25 federal courts.

1 I welcome the Court's questions.

2 JUSTICE THOMAS: Mr. Stone, the -- why  
3 wouldn't you consider the S.B. 8 plaintiffs to  
4 be sort of private attorneys general? If the  
5 attorney general or other state officials don't  
6 enforce the law, would it be that unusual to  
7 consider them as acting in concert with the  
8 state to enforce a state-preferred policy?

9 MR. STONE: Two points, Your Honor.

10 First, every tort action undoubtedly  
11 advances a state-preferred policy. The reason  
12 why they're not acting in concert with or cannot  
13 be called agents --

14 JUSTICE THOMAS: Well, but usually,  
15 when you think of traditional torts, there is a  
16 duty, there's an injury to the individual. It's  
17 a private matter. There is no requirement here  
18 that there be an injury to the plaintiff.

19 MR. STONE: Your Honor, the Texas  
20 Supreme Court has followed Article III  
21 requirements in -- in terms of injury in fact  
22 that doesn't need to appear on the face of the  
23 statute.

24 JUSTICE THOMAS: So what would that  
25 injury be in this -- under S.B. 8 if it's an



1 injury in fact?

2 MR. STONE: One example could be akin  
3 to the injury suffered in the tort of outrage,  
4 where an individual becomes aware of a  
5 non-compliant abortion and they suffer the sort  
6 of same extreme emotional harm. That would  
7 ground an Article III injury for purposes of  
8 Texas law that would be sufficient to satisfy  
9 the Texas Article III-style screen that  
10 addresses some of my friend's on the other  
11 side's concerns about an unlimited set of  
12 lawsuits or that anyone could possibly bring an  
13 S.B. 8 action.

14 Congress passes laws all the time that  
15 don't expressly require that individuals show,  
16 for example, their own personal injury or  
17 traceability or redressability. But,  
18 nonetheless, this Court says those are  
19 fundamental requirements of Article III. And  
20 the Texas Supreme Court traces that same  
21 requirement to its own constitutional analog,  
22 the open courts provision.

23 JUSTICE THOMAS: But I -- I -- forgive  
24 me, but I don't recall an outrage injury. What  
25 would that be? You said extreme outrage, that

1 would be the injury.

2 MR. STONE: Well, the injury would be  
3 akin to the one suffered in a tort of outrage,  
4 where a person witnesses something that  
5 essentially they find to be so extreme and  
6 outrageous it causes them extreme moral or -- or  
7 otherwise psychological harm. That's how it  
8 works --

9 JUSTICE THOMAS: Give me an example of  
10 that.

11 MR. STONE: An individual discovers  
12 that -- that someone -- that a close friend of  
13 theirs who they'd spoken with about -- about  
14 pro-life issues and about abortion has chosen  
15 instead to have a late-term abortion in  
16 violation of S.B. 8, and they were very invested  
17 in the -- basically, in that child's upbringing  
18 and the child's coming into being.

19 To the extent to which there's going  
20 to have to be a tighter nexus or what -- what's  
21 a sufficient injury in fact is going to be  
22 something that the Texas courts have to develop  
23 in the first instance. And, of course, there's  
24 going to be some -- there's going to be some  
25 tether between a real-world -- not just an

1 offense but sort of grievous offense that we  
2 underline -- that we understand underlies IIED  
3 as a tort and still nonetheless has a real-world  
4 -- a real-world harm.

5 JUSTICE THOMAS: Thank you.

6 CHIEF JUSTICE ROBERTS: A --

7 JUSTICE BREYER: I would like a -- oh,  
8 go ahead.

9 CHIEF JUSTICE ROBERTS: I was just  
10 going to ask, assume that the bounty is not  
11 \$10,000 but a million dollars. Do you think in  
12 that case the chill on the conduct at issue here  
13 would be sufficient to allow federal court  
14 review prior to the end of the state court  
15 process?

16 MR. STONE: No, Your Honor, because  
17 that wouldn't affect either the Article III or  
18 sovereign immunity problems inherent in this  
19 case. Undoubtedly, it would increase the chill  
20 the same way that individuals who are exercising  
21 their protected or arguably protected conduct in  
22 a -- in a host of --

23 CHIEF JUSTICE ROBERTS: But, as I  
24 understand it, the -- the only way in which you  
25 get federal court review is, of course, for

1 somebody to take action that violates the state  
2 law and then be sued under the law and then have  
3 the opportunity to raise their defense in  
4 federal court eventually.

5           And you're saying that somebody is  
6 going to undertake that activity even though  
7 they're going to be subject to suit for a  
8 million dollars repetitively because that  
9 doesn't exercise a chilling effect?

10           MR. STONE: That's not what I'm saying  
11 at all, Your Honor. What I'm saying is it  
12 doesn't expand access to the federal courts.  
13 There is still pre-enforcement review I might  
14 note. There are currently 14 pre-enforcement  
15 review challenges pending in a multi-district  
16 litigation in Travis County's state court.

17           So, to speak to specifically your  
18 concern about federal court pre-enforcement  
19 access, no, that wouldn't change the Article III  
20 or sovereign immunity doctrines in play here.

21           And that might very well be a reason  
22 why Congress could be moved to expand access to  
23 the federal courts either through the ordinary  
24 course or by using their Section 5 powers under  
25 the Fourteenth Amendment.

1                   But even if the -- the -- the amount  
2 of the sanction, again, I agree with you, a  
3 million dollars would be tremendous, we could  
4 increase it further, no number would suddenly  
5 cause the federal courts to become more open.

6                   CHIEF JUSTICE ROBERTS: It's not a  
7 question of the federal courts being more open.  
8 It's a question of anybody having the capacity  
9 or ability to go to the federal court, because  
10 nobody is going to risk violating the statute  
11 because they'll be subject to suit for a million  
12 dollars.

13                   That -- that takes a lot of fortitude  
14 to undertake the prohibited conduct in that  
15 case. And under the system, it is only by  
16 undertaking the prohibited conduct that you can  
17 get into federal court.

18                   MR. STONE: Well, Your Honor,  
19 individuals -- again, to the extent that we're  
20 dealing with the sorts of very high-stakes  
21 prohibited conduct, fines, sanctions, et cetera  
22 -- I might add this is specifically a damages  
23 action -- it is capped at much less than that.  
24 That is a significant difference.

25                   CHIEF JUSTICE ROBERTS: Yeah. My --

1 my question is a -- what we call a hypothetical.

2 MR. STONE: Of course, Mr. Chief  
3 Justice. But, nonetheless, an individual facing  
4 extreme sanctions still nonetheless often has to  
5 go through state court systems to vindicate  
6 their -- their federal rights.

7 Individuals are charged with  
8 possessions of firearms in states like Illinois  
9 and New York, and they face multiple-year  
10 incarceration stints as a possibility of trying  
11 to exercise their Second Amendment rights.

12 It is, in fact, the case that  
13 constitutional rights are litigated right now  
14 with very severe potential sanctions for going  
15 through the state courts and with no ability to  
16 go to the federal courts before essentially that  
17 pre-criminal process ends.

18 CHIEF JUSTICE ROBERTS: Why -- why  
19 does the S.B. 8 allow plaintiffs suing abortion  
20 providers to sue anywhere in the state? That's  
21 not the normal way venue works in Texas, is it?

22 MR. STONE: It's not, Your Honor.  
23 And, undoubtedly, there are a variety of  
24 individual -- a handful of individual procedural  
25 rules inherent to S.B. 8 that are designed to

1 favor this cause of action, the same way that  
2 there are some designed to favor causes of  
3 action like bringing a suit under the antitrust  
4 laws or under 1983.

5 Happy to stipulate to that. But  
6 those, to the extent that they became  
7 extraordinary, if anything, might sound in a  
8 procedural due process claim, which my friends  
9 here aren't bringing. They're bringing a  
10 substantive due process claim to S.B. 8 and its  
11 liability itself, and they're attempting to cash  
12 that out through some form of enforcement  
13 against, well, first, Texas officials and then  
14 the court clerks and so on and so on.

15 I might point out, turning  
16 specifically to the assertions my friend on the  
17 other side has said regarding court clerks, that  
18 it's actually not even clear that injunctive  
19 relief against a court clerk would give him what  
20 he wants because, under Texas Rule of Civil  
21 Procedure 22, a petition is deemed filed upon  
22 receipt by the clerk. So the clerk doesn't have  
23 the opportunity to reject that petition.

24 It would obviously be a question of  
25 Texas law in the event that this Court

1 interceded in essentially the post --

2 JUSTICE BREYER: Okay, can I go back  
3 for a second from -- to -- from detail to the  
4 sort of general -- bigger picture, which stuck  
5 in my mind when I read all this road -- you  
6 know, roadmap. That should call up a lot of  
7 arguments in the briefs. And I thought of  
8 Holmes.

9 Two statements: First, Holmes,  
10 remember, had seen John C. Calhoun's theories of  
11 nullification, interposition, destroyed really  
12 by the Civil War, all right? He -- you've heard  
13 -- you read the arguments that say this is sort  
14 of like that.

15 MR. STONE: Of course, Justice.

16 JUSTICE BREYER: Sort of. Sort of.  
17 Okay. Holmes said this: "I do not think the  
18 United States would come to an end if we  
19 lost" -- we, the Court here -- "lost our power  
20 to declare an act of Congress void. I do think  
21 the union would be imperiled if we could not  
22 make that declaration as to the laws of the  
23 states." All right? Keep that in mind.

24 Now Holmes was on the Court for Ex  
25 parte Young. That Court said: "To await



1 proceedings against the company" -- which is the  
2 equivalent of the clinics and the women here --  
3 "in a state court and then obtain review in this  
4 Court would place the company" -- i.e., women  
5 and clinics -- "in peril of large risk and its  
6 agents in great risk of fine and imprisonment,"  
7 which you've just heard, the equivalent. "This  
8 risk, the company, ought not to be required to  
9 take."

10 Now why doesn't Holmes' statement, in  
11 your opinion, illustrate what is the underlying  
12 problem here, generally speaking, and why  
13 doesn't Ex parte Young point the way towards,  
14 not precisely but point the way towards, an  
15 answer?

16 MR. STONE: Two points, Justice  
17 Breyer, the latter being what you're describing  
18 would be something of an expansion of Ex parte  
19 Young, as I think even my friends on the other  
20 side concede, as this Court noted that an  
21 injunction against the courts themselves through  
22 the Ex parte Young device would have been a  
23 violation of our whole scheme of government.

24 Well, this Court, in Grupo Mexicano,  
25 said, specifically speaking about an expansion

1 from a post -- a post-judgment creditor's  
2 ability to distrain a debtor's assets, moving to  
3 a pre-judgment creditor's ability to do so, that  
4 was simply too great of a novel equitable  
5 innovation for this Court to be able to permit  
6 itself to -- to essentially innovate.

7 To do something that would have been  
8 understood in *Ex parte Young*, in the very same  
9 opinion, as the violation of our whole scheme of  
10 government, is surely a much greater innovation.  
11 And if this Court is going to stand by its word  
12 --

13 JUSTICE KAGAN: General Stone, I think  
14 what Justice Breyer is suggesting is that the  
15 entire point of this law, its purpose and its  
16 effect, is to find the chink in the armor of *Ex*  
17 *parte Young*, that *Ex parte Young* set out a basic  
18 principle of how our government is supposed to  
19 work and how people can seek review of  
20 unconstitutional state laws.

21 And the fact that after, oh, these  
22 many years, some geniuses came up with a way to  
23 evade the commands of that decision, as well as  
24 the command that the broader -- the even broader  
25 principle that states are not to nullify federal

1 constitutional rights and to say, oh, we've  
2 never seen this before, so we can't do anything  
3 about it, I -- I -- I guess I just don't  
4 understand the argument.

5 MR. STONE: Let me speak to the latter  
6 point that you're raising, Justice Kagan, first  
7 and then turning back to the Ex parte one --  
8 Young one.

9 This statute on its own terms  
10 specifically incorporates as a matter of state  
11 law the undue burden defense as articulated by  
12 this Court in Casey and subsequent cases.

13 Now there have been some previous  
14 questions regarding whether or not it has  
15 incorporated that in every -- in every  
16 particular regard.

17 There is a separate provision of the  
18 very -- of that law that specifically says that  
19 nothing in the section is -- basically prohibits  
20 individuals from asserting their constitutional  
21 rights.

22 And so, to the extent that the Texas  
23 legislature has either imperfectly or in an  
24 incomplete way recorded as a matter of state law  
25 this Court's -- this Court's recognition of the

1 Casey right, individuals may still erect that  
2 right fully and completely.

3 Nothing in this law even pretends that  
4 Texas courts could evade that because it can't.

5 JUSTICE BARRETT: Well --

6 MR. STONE: And --

7 JUSTICE BARRETT: -- when it said  
8 that, their rights, I took that to be, say,  
9 their First Amendment rights. If you had  
10 somebody who was counseling someone to get an  
11 abortion, say, and then was prosecute -- or was  
12 sued, sorry, not prosecuted, under this law,  
13 that they could say, I have a First Amendment  
14 right to free speech, and so it would be  
15 unconstitutional.

16 I didn't take that particular portion  
17 of the law to mean that they could assert  
18 third-party rights.

19 MR. STONE: We're speaking about two  
20 different portions of the law, Justice Barrett.  
21 There is a portion that says something very  
22 closely tracking what you said. There's also  
23 Subsection F, which says that nothing in this  
24 section shall in any way prohibit, limit,  
25 preclude a defendant from asserting that

1 defendant's personal constitutional rights as a  
2 defense and so on and so forth.

3 JUSTICE BARRETT: Aren't personal  
4 constitutional rights not third-party rights,  
5 and so the clinic's personal rights would differ  
6 from the rights of the woman who's the rights  
7 holder?

8 MR. STONE: There's a different  
9 provision, Your Honor, that says that  
10 individuals may raise the undue burden defense,  
11 the undue burdens rights to the limit allowed by  
12 this -- by this Court specifically.

13 Now it may be the case that those  
14 three provisions don't perfectly line up and by  
15 -- by interpretive forces that at some point a  
16 third-party right that's recognized by this  
17 Court can't be perfectly raised as a state law  
18 defense.

19 If so, as in all cases, an individual  
20 can raise that particular piece or the entire  
21 case as a federal constitutional right, that as  
22 a default, state court judges who swear an oath  
23 to the Constitution, just the way that the  
24 Justices on this Court and the lower federal  
25 courts do, are presumed that they will apply in

1 good faith, and they are always subject to  
2 correction by this Court in any appropriate  
3 case.

4           What can't occur is what couldn't  
5 occur in, for example, New York Times versus  
6 Sullivan or, for that matter, Masterpiece  
7 Cakeshop. An individual there who thinks that  
8 they're going to be subjected to a state court  
9 process that's either going to be very difficult  
10 for them or otherwise unfair to them in terms of  
11 the merits of the decision is not permitted to  
12 go to a lower federal court and seek  
13 functionally an injunction against the state's  
14 trial courts when --

15           JUSTICE KAVANAUGH: General -- General  
16 Stone?

17           MR. STONE: Yes, Justice --

18           JUSTICE KAVANAUGH: Sorry. Keep  
19 going. Keep going.

20           MR. STONE: I'm coming to the close of  
21 my point. I'd be glad to answer your question.

22           JUSTICE KAVANAUGH: Well, I -- I think  
23 all these arguments were the same arguments that  
24 Minnesota raised in Ex parte Young itself. I  
25 mean, you look at the history of that case, it

1 was an extraordinary controversy in the United  
2 States and in Minnesota about the federal court  
3 review, and that itself didn't exist before Ex  
4 parte Young.

5 In other words, that was an extension  
6 of preexisting doctrine to recognize a problem  
7 that the Chief Justice was identifying with  
8 deprivation of constitutional rights and  
9 chilling on the ability to get judicial review.

10 So Ex parte Young sets out this  
11 principle that you can get pre-enforcement  
12 review in federal court against state  
13 enforcement of laws that are assertedly  
14 unconstitutional. And 999 times out of a  
15 thousand or maybe every time until this case,  
16 that's a state executive official. It's a pro  
17 forma exercise usually to identify the state  
18 executive official.

19 And Justice Kagan points out there's a  
20 loophole that's been exploited here or used  
21 here, which is the private suits are enforced by  
22 state court clerks or judges. So the question  
23 becomes, should we extend the principle of Ex  
24 parte Young to, in essence, close that loophole?  
25 In other words, put aside the language in Ex

1 parte Young for a second, and that is strong for  
2 you, I agree, but the principle of Ex parte  
3 Young and the whole sweep of Ex parte Young  
4 would suggest extending the principle here,  
5 arguably.

6 MR. STONE: Two points, Your Honor.

7 One, no, precisely because this Court  
8 has disclaimed the power to create such an  
9 innovation in Grupo Mexicano. To the extent  
10 that were still an open question, then my  
11 friend's arguments on the other side might  
12 militate towards having one exception there.  
13 But this Court has already disclaimed the  
14 ability to give itself the power to essentially  
15 create a novel, non-traditional cause of action.

16 And if the language that we're  
17 discussing in Ex parte Young means anything, it  
18 means that certainly an injunction running  
19 against a state court to prevent the  
20 adjudication of a state law case --

21 JUSTICE KAVANAUGH: Do you --

22 MR. STONE: -- is something entirely  
23 foreign in a traditional way.

24 JUSTICE KAVANAUGH: -- do you -- do  
25 you agree that there's state action when the



1 state court clerk docketing the case?

2 MR. STONE: State action in the sense  
3 of the -- of the Fourteenth Amendment perhaps?

4 JUSTICE KAVANAUGH: Yes.

5 MR. STONE: I suppose that a -- a  
6 state court clerk taking on -- taking on a clerk  
7 is acting as part of the state in that case,  
8 yes, Your Honor, but -- but the key part here is  
9 that my friends on the other side aren't even  
10 alleging that the docketing of a petition  
11 ordinarily is a violation of their -- you know,  
12 is a violation of the Fourteenth Amendment or is  
13 a violation itself.

14 It's the nature that potentially later  
15 down the line that S.B. 8 case -- case might, in  
16 fact, be adjudicated negatively against them. A  
17 state court clerk -- a state court clerk who  
18 receives petitions and puts them on the docket  
19 and a state court judge who is required to apply  
20 this Court's precedents and -- and everything  
21 else, they're not Article III adversaries when  
22 they're doing that process. They're not  
23 committing a wrong.

24 JUSTICE KAVANAUGH: Well, I think the  
25 theory is that the enforcement of the law is

1 adverse to the -- to the plaintiffs' interests  
2 and causes injury, and this state official,  
3 let's say the clerk, is part of the -- within  
4 the chain of state officials who have some  
5 connection, which is the language from Ex parte  
6 Young, some connection to enforcement of the  
7 law.

8 MR. STONE: But -- but, respectfully,  
9 Your Honor, that some connection to enforcement  
10 was referring to -- all the way up the  
11 connection, was the attorney general bringing  
12 the suit. To stop the commencement of a suit in  
13 the language of Ex parte Young meant an  
14 anti-suit injunction against an official to stop  
15 them from --

16 JUSTICE SOTOMAYOR: So can --

17 MR. STONE: -- bringing litigation.

18 JUSTICE SOTOMAYOR: -- can we go to  
19 that question of the attorney general, which  
20 hasn't been raised before? The attorney general  
21 has been sued here.

22 I know that the argument is that he  
23 doesn't enforce this -- these laws, the attorney  
24 general here doesn't enforce these laws. But  
25 the district court suggested that wasn't true.

1 It has some direct enforcement authority with  
2 regard to S.B. 8's fee-shifting provision  
3 concerning any legal challenge to any abortion  
4 restriction or regulation and may also have some  
5 constitutional authority under Texas law to  
6 enforce Texas law.

7 The Ex parte Young fiction was that if  
8 there is an agent who can enforce the law in  
9 part or in whole and they're sued, then everyone  
10 else in the enforcement chain is enjoined.

11 So, if every private citizen here has  
12 been deputized by the state to enforce this law  
13 for the bounty, then why wouldn't an injunction  
14 against the AG bar those citizens from going  
15 into court just the way it would bar attorney --  
16 district attorneys or police officers from  
17 arresting people once that order has been issued  
18 or district attorneys from prosecuting those  
19 people for a violation of the law that a court  
20 has found unconstitutional until the attorney  
21 general, the representative of the state, is not  
22 legal?

23 MR. STONE: Two points, Your Honor, I  
24 will say, one on the attorney general's side and  
25 then one on the private litigant's side.

1                   On the private litigant's side, there  
2                   is no deputization of individuals. The attorney  
3                   general --

4                   JUSTICE SOTOMAYOR: Assume I disagree,  
5                   because you didn't answer to my satisfaction  
6                   Justice Thomas's point that I've never seen a  
7                   tort that doesn't give you redress for your  
8                   harm. It gives you redress for bringing the  
9                   suit, a bounty. And whether you need to prove  
10                  injury for standing is irrelevant to what  
11                  qualifies you for the bounty, which is injury  
12                  doesn't qualify you for that. Just bringing the  
13                  suit does.

14                  MR. STONE: Speaking only specifically  
15                  in this case, because I don't want to -- I don't  
16                  want to push back -- I understand the direction  
17                  of your question, Your Honor -- the attorney  
18                  general, just like every other Texas official,  
19                  lacks the power to either direct a suit, to  
20                  order that a suit be dismissed, to intervene in  
21                  a suit, to otherwise -- to take over a suit --

22                  JUSTICE SOTOMAYOR: You don't  
23                  understand the --

24                  MR. STONE: But --

25                  JUSTICE SOTOMAYOR: -- the point. It

1 -- it is part of the enforcement mechanism of  
2 the suit.

3 MR. STONE: The attorney --

4 JUSTICE SOTOMAYOR: Not the whole,  
5 because the state has chosen to deputize an  
6 entire swath of citizenry to do that for it, but  
7 it retains some direct and indirect enforcement  
8 power.

9 So answer the Ex parte Young fiction.  
10 We issue an injunction in the traditional course  
11 against an AG, and we expect everybody to  
12 understand that they are precluded -- who acts  
13 on behalf of the state to be precluded from  
14 continuing under an unconstitutional law.

15 MR. STONE: The most direct answer to  
16 your question is that an injunction running  
17 against the attorney general wouldn't change  
18 anything he could do. It wouldn't change any  
19 ability to bring a suit. It wouldn't change any  
20 ability to stop a suit. He couldn't withdraw  
21 it.

22 JUSTICE KAGAN: But Mr. -- General  
23 Stone, I mean, think about the question in this  
24 way: Suppose there were not this private  
25 enforcement provision. Suppose this were a

1 normal law, you know, a heartbeat law. You  
2 would sue the attorney general, wouldn't you?

3 MR. STONE: If you -- if the attorney  
4 general were the one charged to sue, I would  
5 assume so.

6 JUSTICE KAGAN: And -- well, if the  
7 attorney general were the one charged to sue, I  
8 mean, the -- the -- the -- the -- the actions  
9 would not be brought by the attorney general.  
10 The actions would be brought by local DAs,  
11 wouldn't they?

12 MR. STONE: Well, Your Honor, the  
13 difference is local DAs in Texas are locally  
14 elected officials that are not accountable to  
15 the attorney general, so that's -- I'm not  
16 trying to push back against the hypo. Just the  
17 -- the facts you've given me fundamentally  
18 change whether or not they'd be accountable to  
19 the AG in some sort of state law sense.

20 JUSTICE KAGAN: Are -- are you saying  
21 that in a normal heartbeat abortion restriction,  
22 we -- a -- a -- a suit against the attorney  
23 general would not be sufficient because local  
24 district attorneys are bringing the suits?

25 MR. STONE: It would depend on whether

1 or not it was charged by the attorney general's  
2 office to sue or by county DAs, who are not  
3 elected by -- who are not elected -- or  
4 essentially not accountable to the attorney  
5 general in any way. But let's -- if I may  
6 modify your hypo a little bit and say that the  
7 office of the attorney general --

8 JUSTICE KAGAN: I guess what I was  
9 suggesting was that in just the same way that  
10 the attorney general does not have direct-line  
11 authority over the DAs, but nobody would dream  
12 of bringing a challenge to Ex parte Young in  
13 that circumstance, so too the fact that they  
14 don't have direct authority over these private  
15 delegated -- private individuals exercising  
16 delegated power shouldn't matter for the same  
17 reason.

18 MR. STONE: In the example you're  
19 describing with county and district attorneys,  
20 individuals would be able to bring Ex parte  
21 Young challenges against those individuals, to  
22 be sure, but not against the attorney general.  
23 And the key difference here would be those  
24 individuals, the county attorneys and district  
25 attorneys, would ultimately be able to enforce

1 the law by bringing a lawsuit.

2           The -- the reason that we're sort  
3 of -- the hypos that I'm -- I'm pushing back  
4 against here are that the United -- that the  
5 attorney general simply doesn't have any control  
6 of the procession of S.B. 8 lawsuits in any way.  
7 He doesn't have a mechanism such as in the qui  
8 tam context to take over -- over the litigation.  
9 He can't certify that a lawsuit is not in the  
10 state's interests or something on that order and  
11 order it dismissed. He has none of those sorts  
12 of mechanisms whatsoever.

13           Because of that, that can't possibly  
14 at a minimum redress the injuries of the  
15 Petitioners unless this Court were to say that  
16 private individuals who have not yet articulated  
17 they plan to bring suits or anything like that  
18 are somehow agents who are acting in concert  
19 with the attorney general.

20           The problem with that is that, again,  
21 we have no authority over them. The basic  
22 concept of agency is that there is a principal  
23 and an agent and the agent is responsible to the  
24 principal.

25           The principal in this hypothetical,



1 the attorney general, exercises no supervisory  
2 authority whatsoever over putative -- putative  
3 suit bringers. And we're not acting in concert  
4 for the ordinary factual reason that, in fact,  
5 we're not being approached.

6 This is -- this is just a matter that  
7 can also be resolved in the district court if it  
8 gets that far. We're not being approached by  
9 directing anyone else's litigation. It's  
10 individual people who are choosing to bring or  
11 not bring these in pre-enforcement challenges in  
12 state court, I think.

13 JUSTICE KAVANAUGH: Can I ask you  
14 about the implications of your position for  
15 other constitutional rights? The amicus brief  
16 of the Firearms Policy Coalition says, "This  
17 will easily become the model for suppression of  
18 other constitutional rights, with Second  
19 Amendment rights being the most likely targets."

20 And it could be free speech rights.  
21 It could be free exercise of religion rights.  
22 It could be Second Amendment rights. If this  
23 position is accepted here, the theory of the  
24 amicus brief is that it can be easily replicated  
25 in other states that disfavor other

1 constitutional rights.

2 Your response?

3 MR. STONE: Your Honor, in several of  
4 those circumstances, individuals who are  
5 concerned that a lack of immediate  
6 pre-enforcement federal court access would cause  
7 them ruinous liability or otherwise suppress  
8 their ability to exercise those rights have  
9 turned to Congress and succeeded.

10 The Protection of Lawful Commerce and  
11 Arms Act, for example, was specifically passed  
12 in response to state tort lawsuits in which  
13 there was no immediate federal review that could  
14 only at most be brought here.

15 JUSTICE KAVANAUGH: Well, for some of  
16 those examples, I think it would be quite  
17 difficult to get legislation through Congress.

18 Are you saying, absent that, that  
19 Second Amendment rights, free exercise of  
20 religion rights, free speech rights, could be  
21 targeted by other states in this using the Ex  
22 parte Young language on 163 and -- and to really  
23 infringe those and to put huge penalties to the  
24 Chief Justice's hypothetical and say everyone  
25 who sells an AR-15 is liable for a million

1 dollars to any citizen. Uncertain what the  
2 Second Amendment status of that ultimately will  
3 be, which is where those laws will have  
4 purchase.

5 Would that kind of law be exempt from  
6 pre-enforcement review in federal court?

7 MR. STONE: My answers on whether or  
8 not the -- whether or not federal court review  
9 is available does not turn on the nature of the  
10 right. So we can put in religious liberties,  
11 Second Amendment --

12 JUSTICE KAVANAUGH: So we can assume  
13 that this will be across the board equally  
14 applicable, as the Firearms Policy Coalition  
15 says, to -- to all constitutional rights?

16 MR. STONE: Yes, but I'd add one more  
17 point, Your Honor, that --

18 JUSTICE KAVANAUGH: Even -- and you've  
19 also said the amount of the penalty doesn't  
20 matter, a million dollars per sale, you know,  
21 anyone, a state passes a law, anyone who  
22 declines to provide a good or service for use in  
23 a same sex marriage, a million dollars, as sued  
24 by anyone in the state, that that's exempt from  
25 pre-enforcement review?

1                   MR. STONE:  Again, Your Honor, what  
2 we'd have to have, for example, in --

3                   JUSTICE KAVANAUGH:  Is that a --

4                   MR. STONE:  -- specifically --

5                   JUSTICE KAVANAUGH:  -- yes or --

6                   MR. STONE:  Yes.  I'm sorry, Your  
7 Honor.  Yes, it is.

8                   JUSTICE KAVANAUGH:  That's a yes,  
9 that's exempt from pre- enforcement review?

10                  MR. STONE:  In the sense of that  
11 federal courts' doctrines and Congress's  
12 statutes defining the jurisdiction of the  
13 federal courts would have to be a -- would have  
14 to be modified by Congress.

15                  JUSTICE KAGAN:  And -- and, General  
16 Stone, your answer to Justice Kavanaugh, which  
17 is go ask Congress, I mean, isn't the point of a  
18 right that you don't have to ask Congress?  
19 Isn't the point of a right that it doesn't  
20 really matter what Congress thinks or what the  
21 majority of the American people think as to that  
22 right?

23                  MR. STONE:  Respectfully, Your Honor,  
24 the answer to that in both part of Justice  
25 Kavanaugh's question, is that just as in the

1 other circumstance -- just as I'm asking for  
2 here for Texas state court judges, we have to  
3 assume that other state courts' judges are, in  
4 fact, going to faithfully apply the  
5 Constitution, its rights, and this Court's  
6 decisions.

7 It will have to occur through the  
8 state court process to be sure, but that is an  
9 adequate substitute and adequate venue that --

10 JUSTICE KAGAN: Within the state court  
11 process maybe many years from now and with a  
12 chilling effect that basically deprives people  
13 who want to exercise the right from the  
14 opportunity to do so in the maybe long-term  
15 interim.

16 CHIEF JUSTICE ROBERTS: Please.

17 MR. STONE: Thank you. No doubt  
18 that's the case in many kinds of lawsuits,  
19 including constitutional ones, Your Honor, but  
20 no one's thought that litigation delays had  
21 constitutional dimension for purposes of  
22 expanding access to the federal courts before.  
23 I don't think this case should be the first one  
24 to start.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 General Stone. I have just one additional  
2 question. There was a statement in one of the  
3 briefs filed below, not -- not by you, that said  
4 "states have every prerogative to adopt  
5 interpretations of the Constitution that differ  
6 from the Supreme Court's."

7 Does the State of Texas have a  
8 position on that?

9 MR. STONE: The State of Texas's  
10 position, Your Honor, is that the courts of the  
11 State of Texas will absolutely faithfully apply  
12 any decisions of this Court as they understand  
13 them to -- to apply to federal -- cases of  
14 federal law faithfully, and that the other  
15 officers inside -- the other officers within  
16 Texas are bound likewise to -- to take the  
17 interpretations from this Court and federal law  
18 and to faithfully implement them.

19 CHIEF JUSTICE ROBERTS: Thank you,  
20 counsel.

21 Justice Thomas?

22 JUSTICE THOMAS: No questions, Chief.

23 CHIEF JUSTICE ROBERTS: Justice  
24 Breyer?

25 JUSTICE BREYER: A technical -- just a

1 quick technical question. In reading Ex parte  
2 Young, I -- I got the impression that the  
3 enforcement mechanism was really private  
4 shippers or passengers who were supposed to sue  
5 the railroad. The attorney general didn't have  
6 any direct power. He just had a kind of  
7 residual power.

8           So I looked up the Texas statute. It  
9 seems like the attorney general here has the  
10 same kind of residual power. Hard to see that  
11 in Ex parte Young because it was a contempt  
12 case. But -- but it seems to be there.

13           And they say this attorney general  
14 with just the residual power, we can go sue him.  
15 Then all your problems would, in that case, but  
16 they didn't appear. And it turned out that the  
17 statute nobody enforced because it had been said  
18 to be unconstitutional in the AG's case.

19           So is there a difference I overlooked?

20           MR. STONE: Even given all of those  
21 provisions, Your Honor, even given all of those  
22 facts, nonetheless, this Court in Ex parte Young  
23 described an injunction running in state courts  
24 and state clerks as a violation of our whole  
25 scheme.

1                   In this particular case, the attorney  
2                   general has no connection whatsoever, not even  
3                   an attenuated one, to -- to the enforcement of  
4                   that law, of S.B. 8.

5                   CHIEF JUSTICE ROBERTS: Justice Alito?

6                   JUSTICE ALITO: What can you tell us  
7                   about the state multi-district litigation? When  
8                   were -- this law was enacted, I believe, in the  
9                   middle of May. When were those suits filed?  
10                  Where do they stand now? Are they being delayed  
11                  as a result of the federal court litigation?  
12                  How quickly might we expect to see a decision in  
13                  that case?

14                  MR. STONE: I can answer some of those  
15                  questions, Your Honor. They were filed fairly  
16                  promptly, I believe just before S.B. 1's or S.B.  
17                  8's effective date. There are currently 14 of  
18                  them proceeding in a multi-district litigation.  
19                  There's a super -- there's -- motions for  
20                  summary judgment are due 10 days from now, so I  
21                  assume that the -- the judge is acting on a  
22                  highly expedited schedule.

23                  As to whether there will be  
24                  post-motions practice or other than that, I  
25                  couldn't say for you. But I have very little



1 doubt the Texas courts are going to treat this  
2 as a case to treat very expeditiously.

3 JUSTICE ALITO: They were filed around  
4 the time when S.B. 8 took effect or around the  
5 time when it was enacted back in May?

6 MR. STONE: I believe it was around  
7 when -- when S.B. 8 took effect.

8 JUSTICE ALITO: And are they being  
9 delayed as a result of the federal court  
10 litigation?

11 MR. STONE: It appears that the --  
12 that, again, since a motion for summary judgment  
13 deadline has been set for 10 days from now, that  
14 they're continuing apace even given this Court's  
15 grant of certiorari.

16 JUSTICE ALITO: My understanding is  
17 that they involve only state law claims and that  
18 the plaintiffs in those cases have not raised  
19 federal constitutional claims. Is that correct?

20 MR. STONE: That's incorrect, Your  
21 Honor. At least one of the litigants is Planned  
22 Parenthood, where they have raised explicitly  
23 the federal constitutional undue burden defense.  
24 So I know at least in that one -- I couldn't  
25 swear to each of the others -- but I know in

1 that one they're certainly explicitly raising  
2 this Court's articulation of the Casey right.

3 JUSTICE ALITO: All right. Thank you.

4 CHIEF JUSTICE ROBERTS: Justice  
5 Sotomayor?

6 JUSTICE SOTOMAYOR: Counsel, Grupo  
7 Mexicano talked about equitable remedies  
8 involving private parties.

9 In 1789, we had just created a new  
10 system of government, so we never had an Ex  
11 parte Young or any other injunctive relief  
12 between governments because we didn't have  
13 anything like this before in England or anywhere  
14 else, the system of government we have created.

15 Now I take and I listen to what Ex  
16 parte Young said about not interfering with the  
17 work of the coordinate branches, ongoing work of  
18 the coordinate branches, but one thing that we  
19 said in Cooper versus Aaron was equally  
20 important, and that is "constitutional rights  
21 declared by this Court can neither be nullified  
22 openly and directly by state legislatures or  
23 state executive or judicial officers" -- and  
24 these are the key words -- "nor indirectly  
25 through evasive schemes."

1           So, given what I just said, that that  
2 principle is inherent in the Constitution, why  
3 am I limited by Grupo Mexicano? Why would I be  
4 looking to a history that can't exist by its  
5 very nature? What does exist are the words we  
6 said in Ex parte Young, which was we are charged  
7 by Congress in ensuring that federal rights are  
8 respected directly or indirectly.

9           So could you respond and tell me why  
10 we're limited by anything in terms of what an  
11 equitable remedy would be like, assuming we were  
12 to find -- and you can challenge the assumption,  
13 but you'll waste your time -- assuming we were  
14 to find that this was intend -- this scheme was  
15 intended to chill abortions that were  
16 constitutional?

17           MR. STONE: Taking all of the  
18 assumptions as I'm obligated to, Your Honor, at  
19 a minimum, this Court's statement in Grupo  
20 Mexicano saying that Congress was the one that  
21 vested the federal courts with equitable  
22 jurisdiction in the first place suggests that  
23 whatever equitable jurisdiction occurs in the  
24 courts occurs because Congress gave it to them.

25           The Court recognized a limitation in

1 Grupo Mexicano that I don't understand -- it was  
2 across a public/private distinction but was a  
3 separation of powers distinction between whether  
4 or not this Court or Congress had to expand  
5 beyond traditional equitable remedies available.  
6 And if nothing else from Ex parte Young is  
7 significant on this point, the one thing that  
8 the "violates our scheme of government" point is  
9 relevant for is that plainly is an indication  
10 that that kind of injunction is not traditional  
11 equity.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?  
13 Justice Gorsuch?

14 JUSTICE GORSUCH: Just a couple  
15 questions. With respect to the MDL that Justice  
16 Alito was asking about, is there anything in  
17 that proceeding that would prohibit parties from  
18 bringing a pre-enforcement action against  
19 Texas's law for violating the Constitution?

20 MR. STONE: No, Your Honor. In fact,  
21 again, some -- there are individuals who are  
22 raising pre-enforcement S.B. 8 challenges --

23 JUSTICE GORSUCH: So there is a --

24 MR. STONE: -- right now against  
25 private individuals.

1 JUSTICE GORSUCH: -- pre-enforcement  
2 action in state court on this issue now?

3 MR. STONE: Right now, yes.

4 JUSTICE GORSUCH: And there is nothing  
5 to prohibit them from bringing one?

6 MR. STONE: Nothing to prohibit them  
7 whatsoever other than identifying a private  
8 plaintiff who's made a reasonable threat of  
9 suing.

10 JUSTICE GORSUCH: Okay. And then, on  
11 the chilling effect question, it's been  
12 suggested that the -- it's the chilling effect  
13 here is different in kind because of bounties  
14 and the involvement of private persons, and I'd  
15 like you to address that.

16 Often, constitutional rights, of  
17 course, can only be enforced in a defensive  
18 posture when an individual is faced either with  
19 potential liability, punitive damages, but also,  
20 of course, civil pine -- fines and even criminal  
21 sanction, including prison time.

22 And I -- I guess I'm -- I want to  
23 understand your argument as to why this is or is  
24 not different in kind.

25 MR. STONE: Well, Your Honor, it's

1 certainly not different in kind. In fact, it's  
2 much milder in degree than a variety of the  
3 constitutional rights we've been discussing in  
4 the state court -- potential downside risks from  
5 failing in state court litigation. Again, in  
6 New York Times v. Sullivan, there was a -- there  
7 was quite a -- quite a great deal of exposure  
8 potentially from that defamation action,  
9 individuals suffering potentially criminal  
10 sanctions for Second Amendment rights all the  
11 time.

12 A \$10,000 liquidated damages provision  
13 and potentially a fee-shifting mechanism on top  
14 of it is comparatively mild compared to, again,  
15 incarceration for asserting a Second Amendment  
16 right.

17 I mean, realistically, none of the  
18 complaints about the -- about the  
19 plaintiff-favoring procedural rules in S.B. 8  
20 would amount to anything even considering a  
21 procedural due process violation if this law  
22 were about making widgets. They're only a sort  
23 of sideways way of casting procedural due  
24 process aspersions on an attempt to get  
25 fundamentally a substantive due process

1 pre-enforcement challenge.

2 JUSTICE GORSUCH: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice --  
4 Justice Barrett?

5 JUSTICE BARRETT: I want to follow up  
6 on Justice Gorsuch's question about the  
7 pre-enforcement challenges in state court. And  
8 you said it's just a matter of finding a private  
9 plaintiff to sue. Is that right?

10 MR. STONE: A private individual who  
11 holds them out that they're going to sue because  
12 --

13 JUSTICE BARRETT: Right.

14 MR. STONE: Right.

15 JUSTICE BARRETT: So, in the -- in the  
16 state court, then, if I understand that answer  
17 you gave to Justice Gorsuch, the same problems  
18 that pervade this pre-enforcement challenge  
19 exist there, that even if they identify a  
20 private potential plaintiff who expresses the  
21 intent to sue, injunction would run only against  
22 that one plaintiff, and we would have all these  
23 same problems because the attorney general can't  
24 be sued in state court. So it -- it doesn't  
25 resolve -- it's not Ex parte Young style, I

1 guess is what I'm asking.

2 MR. STONE: No more than that probably  
3 there's no such Ex parte Young remedy against  
4 individuals generally. Now, if multiple people  
5 acted in concert, they could all be joined.

6 I will say there is one feature of  
7 this law that has been brought up before, which  
8 is that if an individual who is -- who has an  
9 action brought against them pays the -- the  
10 statutory damages amount, then no further  
11 liability can be brought by anyone for that same  
12 act. And so that would extinguish the  
13 down-the-line possibility of sort of an infinite  
14 series of lawsuits. So that has --

15 JUSTICE BARRETT: For that one  
16 abortion.

17 MR. STONE: -- that softens some of  
18 that effect.

19 JUSTICE BARRETT: For that one  
20 abortion. But I -- but I guess what I'm getting  
21 at -- and -- and I think the answer because  
22 you're -- you're shifting -- is that you cannot  
23 get kind of global relief in the same way that a  
24 pre-enforcement challenge under Ex parte Young  
25 in federal court gives you relief from the



1 prospect that the statute would be enforced  
2 against you.

3 And you're saying that in state court  
4 these pre-enforcement actions do not offer that?

5 MR. STONE: That --

6 JUSTICE BARRETT: They're just on an  
7 individual-by-individual basis?

8 MR. STONE: Yes, Justice Barrett, the  
9 same way that an injunction against all  
10 individuals known or unknown in the federal  
11 court would be a remedy unknown to -- to that  
12 court either.

13 JUSTICE BARRETT: You've answered my  
14 question. Thanks.

15 CHIEF JUSTICE ROBERTS: Thank you,  
16 counsel.

17 Rebuttal, Mr. Hearron.

18 REBUTTAL ARGUMENT OF MARC A. HEARRON

19 ON BEHALF OF THE PETITIONERS

20 MR. HEARRON: I'd like to begin by  
21 picking up on the point that -- or the question  
22 that Justice Barrett was just asking. Those 14  
23 pending state court proceedings, any relief  
24 would be against only those defendants who were  
25 sued in those proceedings. The private

1 defendants, they're not the state.

2 And, in fact, the -- the -- the  
3 defendants there are acting strategically in  
4 order to preclude any broader review. They have  
5 now stipulated to temporary injunctions in order  
6 to -- to prevent an injunction that might then  
7 get appealed and get broader relief from the  
8 higher courts.

9 And the other -- the other point about  
10 all of this is -- and this is another special  
11 feature of S.B. 8, which is that normally in  
12 Texas law, Texas has a declaratory judgment act  
13 that allows citizens to sue the -- the State of  
14 Texas or a relative -- or the state agency under  
15 the Texas Declaratory Judgment Act to get that  
16 broader relief. And -- and in S.B. 8, in  
17 Section 171.211, S.B. 8 overrides the state  
18 declaratory judgment act and reasserts sovereign  
19 immunity to prevent exactly that kind of lawsuit  
20 against the state to seek broader review in  
21 state courts.

22 On -- on the concern about  
23 post-viability abortions, I don't think that  
24 that's a concern for the Court, partly because  
25 the -- the Petitioners do not provide

1 post-viability abortions. And under this  
2 Court's precedent in Whole Woman's Health, that  
3 doesn't preclude a statute from being declared  
4 facially unconstitutional. So I don't think  
5 that that's a concern that the Court needs to --  
6 to -- to deal with.

7 But, at the end of the day, what my --  
8 what the State of Texas and what my friends on  
9 the other side are saying is that clinics should  
10 just violate the law. They should go out there,  
11 they should go about business as usual and  
12 subject themselves to the risk that they will be  
13 forced to close their doors.

14 But I want to make clear, Your Honors,  
15 that this is not just a decision for clinics to  
16 make. Even if clinics and health centers  
17 decided to violate the law, they may not find  
18 physicians, nurses, ultrasound technicians,  
19 staff members willing to work behind the desk  
20 because this law targets all of them.

21 Every single person would have to make  
22 the decision, am I willing to subject myself to  
23 the risk that I -- of \$10,000 or more, it's a  
24 minimum liability per abortion, plus the risk  
25 that I'm going to be haled into suits all across

1 the state and I'm going to have my -- my ability  
2 to have an attorney taken away from me because  
3 my attorney may have to pay attorney's fees?

4 Every single person, and that's  
5 exactly what this Court addressed in Ex parte  
6 Young. Ex parte Young and the reason the  
7 principles underlying Ex parte Young support  
8 relief here is one of the things that it said is  
9 that -- that the railroad may not be able to  
10 find an agent or an employee even willing to  
11 violate the law to -- to generate a test case.

12 And so, Your Honor, for all the  
13 reasons that we've stated, we think the  
14 principles of -- of Ex parte Young support  
15 relief here, and we ask that the district  
16 court's decision be affirmed.

17 CHIEF JUSTICE ROBERTS: Thank you,  
18 counsel. The case is submitted.

19 (Whereupon, at 11:26 a.m., the case  
20 was submitted.)

21

22

23

24

25

## Official

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