

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 WHOLE WOMAN'S HEALTH, ET AL.,)
4 Petitioners,)
5 v.) No. 21-463
6 AUSTIN REEVE JACKSON, JUDGE,)
7 DISTRICT COURT OF TEXAS,)
8 114TH DISTRICT, ET AL.,)
9 Respondents.)
10 - - - - -
11
12 Washington, D.C.
13 Monday, November 1, 2021
14
15 The above-entitled matter came on for
16 oral argument before the Supreme Court of the
17 United States at 10:03 a.m.
18
19 APPEARANCES:
20
21 MARC A. HEARRON, ESQUIRE, Washington, D.C.; on behalf
22 of the Petitioners.
23 JUDD E. STONE, II, Solicitor General, Austin, Texas;
24 on behalf of the Respondents.
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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 -- a -- an
17 action after it has already been filed, but it
18 allows for -- it says that -- that there is the
19 power 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 a 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 state -- the lawyer for the state
11 told the district court that Texas law is quite
12 different from federal law on the question of
13 how standing and private interests versus public
14 interests work. They said that at page 49 of
15 the transcript of the preliminary injunction
16 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 can satisfy
9 third-party standing rules because the statute
10 says it has to be Craig versus Boren, not the
11 regular abortion third-party standing rules --
12 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 precedent

1 in -- in Casey, but -- but, Your Honor, it's
2 unclear exactly how the Texas courts would apply
3 that, whether they would follow the undue burden
4 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 precedents 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 asks 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 state has made the clerks

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

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

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

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

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

23 JUSTICE BARRETT: It's -- okay. It --
24 I -- I think there is language in Ex parte Young
25 that favors you. And I don't think Thunder

1 Basin -- I think Thunder Basin assumes that
2 there might be some circumstances in which
3 pre-enforcement review is constitutionally
4 required.

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

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

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

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

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Justice Thomas, anything further?

25 JUSTICE THOMAS: No, Chief.

1 CHIEF JUSTICE ROBERTS: Justice
2 Breyer?

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

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

24 I have six that I caught from you. Is
25 there a seventh?

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

3 JUSTICE BREYER: Okay.

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

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

14 JUSTICE BREYER: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice Alito?

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

24 And you say the clerk should say what?

25 MR. HEARRON: The clerk should reject

1 the filing of that lawsuit.

2 JUSTICE ALITO: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Sotomayor?

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

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

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

16 MR. HEARRON: Yes.

17 JUSTICE SOTOMAYOR: Thank you.

18 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

25 MR. HEARRON: We are requesting an

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

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

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

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

1 pending class certification motion.

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

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

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

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

1 enforcement should -- should flow.

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

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

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

8 CHIEF JUSTICE ROBERTS: Sure.

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

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

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

1 JUSTICE SOTOMAYOR: Were you granted a
2 stay of enforcement of the law?

3 MR. HEARRON: Were we granted --

4 JUSTICE SOTOMAYOR: By the district
5 court?

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

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

10 MR. HEARRON: Yes. We -- we did not
11 yet --

12 JUSTICE SOTOMAYOR: I forgot.

13 MR. HEARRON: We --

14 JUSTICE SOTOMAYOR: Thank you.

15 MR. HEARRON: Yeah.

16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch?

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

24 MR. HEARRON: Not to this extent,
25 yeah, but there may --

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

7 MR. HEARRON: Yes.

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

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

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

16 MR. HEARRON: That's probably correct.

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

20 MR. HEARRON: Yes.

21 JUSTICE GORSUCH: -- in your -- in
22 your mind? Okay. And then, on -- on -- on the
23 relief, am I understanding you correctly that --
24 that relief against the clerks, you think, is
25 sufficient for your purposes?

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

8 JUSTICE GORSUCH: Okay.

9 MR. HEARRON: -- against the clerks
10 would --

11 JUSTICE GORSUCH: So if that --

12 MR. HEARRON: -- be sufficient.

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

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

24 JUSTICE GORSUCH: But that's pursuant
25 to an -- a judicial order?

1 MR. HEARRON: Yes.

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

5 MR. HEARRON: Yes.

6 JUSTICE GORSUCH: Okay. And so --

7 MR. HEARRON: And -- and -- and that's
8 --

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

12 MR. HEARRON: Yes, we believe so, Your
13 Honor.

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

23 MR. HEARRON: I -- I don't think --
24 no, I -- I think that they should be enjoined
25 from docketing any S.B. 8 lawsuits because S.B.

1 8, we believe, is --

2 JUSTICE GORSUCH: Including
3 constitutional ones?

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

8 JUSTICE GORSUCH: Exactly.

9 MR. HEARRON: -- but I --

10 JUSTICE GORSUCH: But you'd enjoin
11 them anyway?

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

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

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

24 JUSTICE GORSUCH: But subject to those
25 due process standards?

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

4 JUSTICE GORSUCH: Thank you.

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

9 CHIEF JUSTICE ROBERTS: Justice
10 Kavanaugh?

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

15 MR. HEARRON: Yes.

16 JUSTICE KAVANAUGH: -- and the class
17 certification. Is that accurate?

18 MR. HEARRON: Yes.

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

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

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

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

1 load. I'll give you another chance to respond
2 to that.

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

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

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

20 JUSTICE KAVANAUGH: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice
22 Barrett?

23 JUSTICE BARRETT: No.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 General Stone.

2 ORAL ARGUMENT OF JUDD E. STONE, II,

3 ON BEHALF OF THE RESPONDENTS

4 MR. STONE: Thank you, Mr. Chief

5 Justice, and may it please the Court:

6 Petitioners' pursuit of an injunction
7 suffers from two fundamental problems.

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

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

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

24 Petitioners then turned to state court
25 judges and state court clerks and, apparently,

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

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

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

24 I welcome the Court's questions.

25 JUSTICE THOMAS: Mr. Stone, the -- why

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

7 MR. STONE: Two points, Your Honor.

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

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

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

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

25 MR. STONE: One example could be akin

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

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

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

25 MR. STONE: Well, the injury would be

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

7 JUSTICE THOMAS: Give me an example of
8 that.

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

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

1 as a tort and still nonetheless has a real-world
2 -- a real-world harm.

3 JUSTICE THOMAS: Thank you.

4 CHIEF JUSTICE ROBERTS: A --

5 JUSTICE BREYER: I would like a -- oh,
6 go ahead.

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

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

21 CHIEF JUSTICE ROBERTS: But, as I
22 understand it, the -- the only way in which you
23 get federal court review is, of course, for
24 somebody to take action that violates the state
25 law and then be sued under the law and then have

1 the opportunity to raise their defense in
2 federal court eventually.

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

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

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

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

24 But even if the -- the -- the amount
25 of the sanction, again, I agree with you, a

1 million dollars would be tremendous, we could
2 increase it further, no number would suddenly
3 cause the federal courts to become more open.

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

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

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

23 CHIEF JUSTICE ROBERTS: Yeah. My --
24 my question is a -- what we call a hypothetical.

25 MR. STONE: Of course, Mr. Chief

1 Justice. But, nonetheless, an individual facing
2 extreme sanctions still nonetheless often has to
3 go through state court systems to vindicate
4 their -- their federal rights.

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

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

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

20 MR. STONE: It's not, Your Honor.
21 And, undoubtedly, there are a variety of
22 individual -- a handful of individual procedural
23 rules inherent to S.B. 8 that are designed to
24 favor this cause of action, the same way that
25 there are some designed to favor causes of

1 action like bringing a suit under the antitrust
2 laws or under 1983.

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

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

22 It would obviously be a question of
23 Texas law in the event that this Court
24 interceded in essentially the post --

25 JUSTICE BREYER: Can I go back for a

1 second from -- to -- from detail to the sort of
2 general -- bigger picture, which stuck in my
3 mind when I read all this road -- you know,
4 roadmap. That should call up a lot of arguments
5 in the briefs. And I thought of Holmes.

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

12 MR. STONE: Of course, Justice.

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

21 Now Holmes was on the Court for Ex
22 parte Young. That Court said: "To await
23 proceedings against the company" -- which is the
24 equivalent of the clinics and the women here --
25 "in a state court and then obtain review in this

1 Court would place the company" -- i.e., women
2 and clinics -- "in peril of large risk and its
3 agents in great risk of fine and imprisonment,"
4 which you've just heard, the equivalent. "This
5 risk, the company, ought not to be required to
6 take."

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

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

21 Well, this Court, in Grupo Mexicano,
22 said, specifically speaking about an expansion
23 from a post -- a post-judgment creditor's
24 ability to distraint a debtor's assets, moving
25 to a pre-judgment creditor's ability to do so,

1 that was simply too great of a novel equitable
2 innovation for this Court to be able to permit
3 itself to essentially innovate.

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

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

18 And the fact that after, oh, these
19 many years, some geniuses came up with a way to
20 evade the commands of that decision, as well as
21 the command that the broader -- the even broader
22 principle that states are not to nullify federal
23 constitutional rights and to say, oh, we've
24 never seen this before, so we can't do anything
25 about it, I -- I -- I guess I just don't

1 understand the argument.

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

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

10 Now there have been some previous
11 questions regarding whether or not it has
12 incorporated that in every -- in every
13 particular regard.

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

19 And so, to the extent that the Texas
20 legislature has either imperfectly or in an
21 incomplete way recorded as a matter of state law
22 this Court's -- this Court's recognition of the
23 Casey right, individuals may still erect that
24 right fully and completely.

25 Nothing in this law even pretends that

1 Texas courts could evade that because it can't.

2 JUSTICE BARRETT: Well --

3 MR. STONE: And --

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

13 I didn't take that particular portion
14 of the law to mean that they could assert
15 third-party rights.

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

25 JUSTICE BARRETT: Aren't personal

1 constitutional rights not third-party rights,
2 and so the clinic's personal rights would differ
3 from the rights of the woman who's the rights
4 holder?

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

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

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

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

12 JUSTICE KAVANAUGH: General -- General
13 Stone?

14 MR. STONE: Yes, Justice --

15 JUSTICE KAVANAUGH: Sorry. Keep
16 going. Keep going.

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

19 JUSTICE KAVANAUGH: Well, I -- I think
20 all these arguments were the same arguments that
21 Minnesota raised in Ex parte Young itself. I
22 mean, you look at the history of that case, it
23 was an extraordinary controversy in the United
24 States and in Minnesota about the federal court
25 review, and that itself didn't exist before Ex

1 parte Young.

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

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

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

1 would suggest extending the principle here,
2 arguably.

3 MR. STONE: Two points, Your Honor.

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

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

18 JUSTICE KAVANAUGH: Do you --

19 MR. STONE: -- is something entirely
20 foreign in a traditional way.

21 JUSTICE KAVANAUGH: -- do you -- do
22 you agree that there's state action when the
23 state court clerk docket the case?

24 MR. STONE: State action in the sense
25 of the -- of the Fourteenth Amendment perhaps?

1 JUSTICE KAVANAUGH: Yes.

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

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

21 JUSTICE KAVANAUGH: Well, I think the
22 theory is that the enforcement of the law is
23 adverse to the -- to the plaintiffs' interests
24 and causes injury, and this state official,
25 let's say the clerk, is part of the -- within

1 the chain of state officials who have some
2 connection, which is the language from Ex parte
3 Young, some connection to enforcement of the
4 law.

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

13 JUSTICE SOTOMAYOR: So can --

14 MR. STONE: -- bringing litigation.

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

19 I know that the argument is that he
20 doesn't enforce this -- these laws, the attorney
21 general here doesn't enforce these laws. But
22 the district court suggested that wasn't true.
23 It has some direct enforcement authority with
24 regard to S.B. 8's fee-shifting provision
25 concerning any legal challenge to any abortion

1 restriction or regulation and may also have some
2 constitutional authority under Texas law to
3 enforce Texas law.

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

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

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

23 On the private litigant's side, there
24 is no deputization of individuals. The attorney
25 general --

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

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

19 JUSTICE SOTOMAYOR: You don't
20 understand the --

21 MR. STONE: But --

22 JUSTICE SOTOMAYOR: -- the point. It
23 -- it is part of the enforcement mechanism of
24 the suit.

25 MR. STONE: The attorney --

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

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

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

19 JUSTICE KAGAN: But Mr. -- General
20 Stone, I mean, think about the question in this
21 way: Suppose there were not this private
22 enforcement provision. Suppose this were a
23 normal law, you know, a heartbeat law. You
24 would sue the attorney general, wouldn't you?

25 MR. STONE: If the -- if the attorney

1 general were the one charged to sue, I would
2 assume so.

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

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

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

21 MR. STONE: It would depend on whether
22 or not it was charged by the attorney general's
23 office to sue or by county DAs, who are not
24 elected by -- who are not elected -- or
25 essentially not accountable to the attorney

1 general in any way. But let's -- if I may
2 modify your hypo a little bit and say that the
3 office of the attorney general --

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

14 MR. STONE: In the example you're
15 describing with county and district attorneys,
16 individuals would be able to bring Ex parte
17 Young challenges against those individuals, to
18 be sure, but not against the attorney general.
19 And the key difference here would be those
20 individuals, the county attorneys and district
21 attorneys, would ultimately be able to enforce
22 the law by bringing a lawsuit.

23 The -- the reason that we're sort
24 of -- the hypos that I'm -- I'm pushing back
25 against here are that the United -- that the

1 attorney general simply doesn't have any control
2 of the procession of S.B. 8 lawsuits in any way.
3 He doesn't have a mechanism such as in the qui
4 tam context to take over -- over the litigation.
5 He can't certify that a lawsuit is not in the
6 state's interests or something on that order and
7 order it dismissed. He has none of those sorts
8 of mechanisms whatsoever.

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

16 The problem with that is that, again,
17 we have no authority over them. The basic
18 concept of agency is that there is a principal
19 and an agent and the agent is responsible to the
20 principal.

21 The principal in this hypothetical,
22 the attorney general, exercises no supervisory
23 authority whatsoever over putative -- putative
24 suit bringers. And we're not acting in concert
25 for the ordinary factual reason that, in fact,

1 we're not being approached.

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

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

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

23 Your response?

24 MR. STONE: Your Honor, in several of
25 those circumstances, individuals who are

1 concerned that a lack of immediate
2 pre-enforcement federal court access would cause
3 them ruinous liability or otherwise suppress
4 their ability to exercise those rights have
5 turned to Congress and succeeded.

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

11 JUSTICE KAVANAUGH: Well, for some of
12 those examples, I think it would be quite
13 difficult to get legislation through Congress.

14 Are you saying, absent that, that
15 Second Amendment rights, free exercise of
16 religion rights, free speech rights, could be
17 targeted by other states in this using the Ex
18 parte Young language on 163 and -- and to really
19 infringe those and to put huge penalties to the
20 Chief Justice's hypothetical and say everyone
21 who sells an AR-15 is liable for a million
22 dollars to any citizen. Uncertain what the
23 Second Amendment status of that ultimately will
24 be, which is where those laws will have
25 purchase.

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

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

8 JUSTICE KAVANAUGH: So we can assume
9 that this will be across the board equally
10 applicable, as the Firearms Policy Coalition
11 says, to -- to all constitutional rights?

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

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

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

24 JUSTICE KAVANAUGH: Is that a --

25 MR. STONE: -- specifically --

1 JUSTICE KAVANAUGH: -- yes or --

2 MR. STONE: Yes. I'm sorry, Your
3 Honor. Yes, it is.

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

6 MR. STONE: In the sense of that
7 federal courts' doctrines and Congress's
8 statutes defining the jurisdiction of the
9 federal courts would have to be a -- would have
10 to be modified by Congress.

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

19 MR. STONE: Respectfully, Your Honor,
20 the answer to that in both part of Justice
21 Kavanaugh's question, is that just as in the
22 other circumstance -- just as I'm asking for
23 here for Texas state court judges, we have to
24 assume that other state courts' judges are, in
25 fact, going to faithfully apply the

1 Constitution, its rights, and this Court's
2 decisions.

3 It will have to occur through the
4 state court process to be sure, but that is an
5 adequate substitute and adequate venue that --

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

12 CHIEF JUSTICE ROBERTS: Please.

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

21 CHIEF JUSTICE ROBERTS: Thank you,
22 General Stone. I have just one additional
23 question. There was a statement in one of the
24 briefs filed below, not -- not by you, that said
25 "states have every prerogative to adopt

1 interpretations of the Constitution that differ
2 from the Supreme Court's."

3 Does the State of Texas have a
4 position on that?

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

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Justice Thomas?

18 JUSTICE THOMAS: No questions, Chief.

19 CHIEF JUSTICE ROBERTS: Justice
20 Breyer?

21 JUSTICE BREYER: A technical -- just a
22 quick technical question. In reading *Ex parte*
23 *Young*, I -- I got the impression that the
24 enforcement mechanism was really private
25 shippers or passengers who were supposed to sue

1 the railroad. The attorney general didn't have
2 any direct power. He just had a kind of
3 residual power.

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

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

15 So is there a difference I overlooked?

16 MR. STONE: Even given all of those
17 provisions, Your Honor, even given all of those
18 facts, nonetheless, this Court in Ex parte Young
19 described an injunction running in state courts
20 and state clerks as a violation of the whole
21 scheme.

22 In this particular case, the attorney
23 general has no connection whatsoever, not even
24 an attenuated one, to -- to the enforcement of
25 that law, of S.B. 8.

1 CHIEF JUSTICE ROBERTS: Justice Alito?

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

10 MR. STONE: I can answer some of those
11 questions, Your Honor. They were filed fairly
12 promptly, I believe just before S.B. 1's or S.B.
13 8's effective date. There are currently 14 of
14 them proceeding in a multi-district litigation.
15 There's -- there's -- motions for summary
16 judgment are due 10 days from now, so I assume
17 that the -- the judge is acting on a highly
18 expedited schedule.

19 As to whether there will be
20 post-motions practice or other than that, I
21 couldn't say for you. But I have very little
22 doubt the Texas courts are going to treat this
23 as a case to treat very expeditiously.

24 JUSTICE ALITO: They were filed around
25 the time when S.B. 8 took effect or around the

1 time when it was enacted back in May?

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

4 JUSTICE ALITO: And are they being
5 delayed as a result of the federal court
6 litigation?

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

12 JUSTICE ALITO: My understanding is
13 that they involve only state law claims and that
14 the plaintiffs in those cases have not raised
15 federal constitutional claims. Is that correct?

16 MR. STONE: That's incorrect, Your
17 Honor. At least one of the litigants is
18 Planned Parenthood, where they have raised
19 explicitly the federal constitutional undue
20 burden defense. So I know at least in that one
21 -- I couldn't swear to each of the others -- but
22 I know in that one they're certainly explicitly
23 raising this Court's articulation of the Casey
24 right.

25 JUSTICE ALITO: All right. Thank you.

1 CHIEF JUSTICE ROBERTS: Justice
2 Sotomayor?

3 JUSTICE SOTOMAYOR: Counsel, Grupo
4 Mexicano talked about equitable remedies
5 involving private parties.

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

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

23 So, given what I just said, that that
24 principle is inherent in the Constitution, why
25 am I limited by Grupo Mexicano? Why would I be

1 looking to a history that can't exist by its
2 very nature? What does exist are the words we
3 said in Ex parte Young, which was we are charged
4 by Congress in ensuring that federal rights are
5 respected directly or indirectly.

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

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

22 The Court recognized a limitation in
23 Grupo Mexicano that I don't understand -- it was
24 across a public/private distinction but was a
25 separation of powers distinction between whether

1 or not this Court or Congress had to expand
2 beyond traditional equitable remedies available.
3 And if nothing else from Ex parte Young is
4 significant on this point, the one thing that
5 the "violates our scheme of government" point is
6 relevant for is that plainly is an indication
7 that that kind of injunction is not traditional
8 equity.

9 CHIEF JUSTICE ROBERTS: Justice Kagan?
10 Justice Gorsuch?

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

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

20 JUSTICE GORSUCH: So there is a --

21 MR. STONE: -- right now against
22 private individuals.

23 JUSTICE GORSUCH: -- pre-enforcement
24 action in state court on this issue now?

25 MR. STONE: Right now, yes.

1 JUSTICE GORSUCH: And there is nothing
2 to prohibit them from bringing one?

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

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

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

19 And I -- I guess I'm -- I want to
20 understand your argument as to why this is or is
21 not different in kind.

22 MR. STONE: Well, Your Honor, it's
23 certainly not different in kind. In fact, it's
24 much milder in degree than a variety of the
25 constitutional rights we've been discussing in

1 the state court -- potential downside risks from
2 failing in state court litigation. Again, in
3 New York Times v. Sullivan, there was a -- there
4 was quite a -- quite a great deal of exposure
5 potentially from that defamation action,
6 individuals suffering potentially criminal
7 sanctions for Second Amendment rights all the
8 time.

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

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

24 JUSTICE GORSUCH: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice --

1 Justice Barrett?

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

7 MR. STONE: A private individual who
8 holds them out that they're going to sue because
9 --

10 JUSTICE BARRETT: Right.

11 MR. STONE: Right.

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

24 MR. STONE: No more than that probably
25 there's no such Ex parte Young remedy against

1 individuals generally. Now, if multiple people
2 acted in concert, they could all be joined.

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

12 JUSTICE BARRETT: For that one
13 abortion.

14 MR. STONE: -- that softens some of
15 that effect.

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

25 And you're saying that in state court

1 these pre-enforcement actions do not offer that?

2 MR. STONE: That --

3 JUSTICE BARRETT: They're just on an
4 individual-by-individual basis?

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

10 JUSTICE BARRETT: You've answered my
11 question. Thanks.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 Rebuttal, Mr. Hearron.

15 REBUTTAL ARGUMENT OF MARC A. HEARRON
16 ON BEHALF OF THE PETITIONERS

17 MR. HEARRON: I'd like to begin by
18 picking up on the point that -- or the question
19 that Justice Barrett was just asking. Those 14
20 pending state court proceedings, any relief
21 would be against only those defendants who were
22 sued in those proceedings. The private
23 defendants, they're not the state.

24 And, in fact, the -- the defendants
25 there were acting strategically in order to

1 preclude any broader review. They have now
2 stipulated to temporary injunctions in order to
3 -- to prevent an injunction that might then get
4 appealed and get broader relief from the higher
5 courts.

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

19 On -- on the concern about
20 post-viability abortions, I don't think that
21 that's a concern for the Court, partly because
22 the -- the Petitioners do not provide
23 post-viability abortions. And under this
24 Court's precedent in Whole Woman's Health, that
25 doesn't preclude a statute from being declared

1 facially unconstitutional. So I don't think
2 that that's a concern that the Court needs to --
3 to -- to deal with.

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

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

18 Every single person would have to make
19 the decision, am I willing to subject myself to
20 the risk that I -- of \$10,000 or more, it's a
21 minimum liability per abortion, plus the risk
22 that I'm going to be haled into suits all across
23 the state and I'm going to have my -- my ability
24 to have an attorney taken away from me because
25 my attorney may have to pay attorney's fees?

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

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

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel. The case is submitted.

16 (Whereupon, at 11:26 a.m., the case
17 was submitted.)

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