



1 IN THE SUPREME COURT OF THE UNITED STATES

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3 UNITED STATES, )

4 Petitioner, )

5 v. ) No. 21-588

6 TEXAS, ET AL., ) (21A85)

7 Respondents. )

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9

10 Washington, D.C.

11 Monday, November 1, 2021

12

13 The above-entitled matter came on for  
14 oral argument before the Supreme Court of the  
15 United States at 11:28 a.m.

16

17 APPEARANCES:

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19 Department of Justice, Washington, D.C.; on behalf  
20 of the Petitioner.

21 JUDD E. STONE, II, Solicitor General, Austin, Texas;

22 on behalf of the State Respondent.

23 JONATHAN F. MITCHELL, ESQUIRE, Austin, Texas; on

24 behalf of the Private Respondents.

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1 P R O C E E D I N G S

2 (11:28 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear  
4 argument next in Case 21-588, United States  
5 versus Texas.

6 General Prelogar.

7 ORAL ARGUMENT OF ELIZABETH B. PRELOGAR

8 ON BEHALF OF THE PETITIONER

9 GENERAL PRELOGAR: Mr. Chief Justice,  
10 and may it please the Court:

11 Texas designed S.B. 8 to thwart the  
12 supremacy of federal law in open defiance of our  
13 constitutional structure. States are free to  
14 ask this Court to reconsider its constitutional  
15 precedents, but they are not free to place  
16 themselves above this Court, nullify the Court's  
17 decisions in their borders, and block the  
18 judicial review necessary to vindicate federal  
19 rights.

20 As this case comes to the Court, there  
21 are three principal questions: First, is Texas  
22 responsible for this law? Second, can the  
23 United States sue to hold Texas to account?  
24 And, third, is the injunctive relief available?

25 And the answer is yes down the line.

1 Texas is responsible for the constitutional  
2 violation here. It enacted a law that clearly  
3 violates this Court's precedents. It designed  
4 that law to thwart judicial review by offering  
5 bounties to the general public to carry out the  
6 state's enforcement function, and it structured  
7 those enforcement proceedings to be so  
8 burdensome and to threaten such significant  
9 liability that they chill the exercise of the  
10 constitutional right altogether.

11 The United States has a manifest  
12 sovereign interest in suing to redress this  
13 violation. S.B. 8 is a brazen attack on the  
14 coordinate branches of the federal government.  
15 It's an attack on the authority of this Court to  
16 say what the law is and to have that judgment  
17 respected across the 50 states. And it's an  
18 attack on Congress's determination that there  
19 should be access to pre-enforcement review in  
20 federal court to vindicate federal rights. The  
21 United States may sue to protect the supremacy  
22 of federal law against this attack.

23 Finally, the injunction is a proper  
24 response to Texas's unprecedented law. If Texas  
25 can nullify Roe and Casey in this manner, then

1 other states could do the same with other  
2 constitutional rights or other decisions of this  
3 Court that they disfavor.

4 Federal courts are not powerless to  
5 craft relief to stop that intolerable threat to  
6 our constitutional hierarchy.

7 JUSTICE THOMAS: General Prelogar,  
8 would you spend just a few minutes on the United  
9 States' interest that gives you a basis for  
10 being involved in this suit?

11 GENERAL PRELOGAR: Of course, Justice  
12 Thomas. The interest of the United States here  
13 is the sovereign interest in ensuring that  
14 states cannot flout the supremacy of federal law  
15 by enacting a law that's clearly  
16 unconstitutional and then, through this simple  
17 mechanism of outsourcing enforcement authority  
18 to the world at large, blocking the traditional  
19 mechanisms for judicial review that -- that  
20 Congress in Section 1983 and that this Court in  
21 *Ex parte Young* recognized would be vital to  
22 securing federal constitutional rights against  
23 that kind of law.

24 JUSTICE THOMAS: Is there any  
25 difference between legislation and precedents of

1 this Court as far as the supremacy interests  
2 that you have?

3 GENERAL PRELOGAR: I think that if a  
4 state structured a law in exactly this manner to  
5 try to flout this Court's precedents, for  
6 example, interpreting statutes, that it would  
7 raise that same kind of supremacy concern.

8 But, of course, here, I think that the  
9 situation has additional urgency because what  
10 Texas has done is taken a constitutional  
11 precedent from this Court and legislated in  
12 direct defiance of that precedent and then tried  
13 to, in the words of the intervenors, box the  
14 judiciary out of the equation and prevent the  
15 courts from being able to provide any meaningful  
16 form of redress.

17 JUSTICE THOMAS: You -- you --

18 JUSTICE BREYER: Do -- go ahead.

19 JUSTICE THOMAS: You -- you based your  
20 involvement quite a bit on Debs. Can you give  
21 me a couple of examples where the United States  
22 has taken a similar action based on Debs?

23 GENERAL PRELOGAR: I'd be happy to,  
24 and I want to knowledge at the outset that we  
25 can't point to a case that looks exactly like

1 this one, and that's because there has never  
2 been a law exactly like this one. No state has  
3 ever sought to challenge the supremacy of  
4 federal law and keep the courts out of the  
5 equation in quite the same way.

6 But I think that there are relevant  
7 principles to distill from the Debs line of  
8 cases. And what the Court has said is that the  
9 United States cannot come in and seek to  
10 intervene in a merely private dispute. It needs  
11 to be acting on the basis of the public interest  
12 and the public at large and that, further, the  
13 subject matter of the suit has to be one that  
14 concerns and is entrusted to the care of the  
15 nation as a whole and for which the nation owes  
16 a duty to her citizens.

17 And this Court, in various precedents  
18 in the Debs line, has recognized that that kind  
19 of sovereign interest can occur in -- in a  
20 variety of circumstances. For example, in the  
21 American Bell case, the Court recognized that  
22 the United States could sue in equity to seek to  
23 void a patent that had been obtained by fraud  
24 even though the United States had no  
25 reversionary interest or proprietary interest in



1 that patent. It was acting on behalf of the  
2 nation as a whole to ensure that there couldn't  
3 be an acquisition of a monopoly that was based  
4 on fraud in that manner.

5 JUSTICE THOMAS: Well, actually, what  
6 I'm more interested in is, have you done  
7 something similar when a constitutional right  
8 has been involved? For example, there was much  
9 discussion about tort actions that were allowed  
10 in states involving Second Amendment rights.  
11 I'm sure there were many opportunities in the  
12 area of race, particularly during segregation,  
13 to do similar things.

14 Do you have any examples, not  
15 precedents but examples, of the national  
16 government taking part in or playing the exact  
17 same role or doing exactly what you're doing in  
18 other areas involving constitutional rights?

19 GENERAL PRELOGAR: I don't have  
20 examples, but that's because I'm not aware of  
21 any circumstance where a state before has sought  
22 to prevent access to the ordinary mechanisms for  
23 judicial review that --

24 JUSTICE THOMAS: Well, even if --

25 GENERAL PRELOGAR: -- safeguard

1 federal rights.

2 JUSTICE THOMAS: -- it's not exactly  
3 the same, when a constitutional right is being  
4 frustrated by a state process, have you sought  
5 to participate in the manner that you're  
6 participating now because the supremacy of the  
7 -- of a U.S. law or constitutional right is not  
8 being respected?

9 GENERAL PRELOGAR: Well, I want to be  
10 very clear, Justice Thomas, that we're not  
11 asserting here an authority to sue just because  
12 the state enacted an unconstitutional law.  
13 Ordinarily, that wouldn't present the same grave  
14 threat to supremacy because, under Section 1983  
15 or Ex parte Young, there would be a swift  
16 pre-enforcement remedy in federal court.

17 And so the interest we're asserting  
18 here isn't intrinsically tied to the underlying  
19 substantive right at issue. It's tied to the  
20 fact that the state has structured this scheme  
21 in a deliberate attempt to prevent federal  
22 courts from doing anything about the  
23 constitutional violation.

24 And because a state has never before  
25 crafted an enforcement scheme like this, there

1 has not been the kind of situation that would  
2 prompt the United States to intervene in this  
3 manner.

4 JUSTICE KAGAN: General Prelogar,  
5 could I take you to one of the other questions  
6 that you started with? In these extremely  
7 unusual, unprecedented circumstances, you said  
8 the Court is not powerless to craft relief.

9 Well, you heard the last argument, and  
10 there were -- much of the last argument was all  
11 about, like, what would relief look like and how  
12 should we craft relief if -- if it were -- if  
13 relief were appropriate? And there were -- you  
14 know, is it a -- an injunction against the  
15 clerks or is it an injunction against the state  
16 AG or is it an injunction against -- fill in the  
17 blank. How should we craft relief?

18 GENERAL PRELOGAR: I think the  
19 appropriate relief here is the relief that the  
20 district court entered. The court enjoined  
21 Texas from implementing S.B. 8 and enforcing it  
22 in any manner, and then the court went further  
23 to identify all the various stages of the S.B. 8  
24 enforcement proceedings where that injunction  
25 would -- would operate to stop the threat of

1 those enforcement actions that have chilled the  
2 exercise of the right.

3           And there were three relevant  
4 features. First, the district court said that  
5 the injunction would appropriately bind those  
6 S.B. 8 plaintiffs who actually choose to  
7 exercise the state's enforcement authority. And  
8 so those who actually file suit thereby act in  
9 concert or actively participate with the state.

10           Second, the district court recognized  
11 that in these very unusual circumstances it was  
12 also appropriate to bind the clerks and the  
13 judges, who are being used as part of the  
14 machinery of this apparatus to impose the  
15 substantial chilling effect through the S.B. 8  
16 enforcement actions.

17           And, finally, the district court  
18 recognized that the injunction would reach on  
19 the back end any effort by state officials to  
20 enforce those judgments because that too would  
21 perpetuate the constitutional violation.

22           So I think we have the model already.  
23 It's the injunction the United States obtained  
24 in this case, and it's intended to provide full  
25 and complete relief against the threat, the

1 grave threat that S.B. 8 is posing to the  
2 supremacy of federal law right now.

3 JUSTICE KAGAN: And if there's some  
4 fear that the law we make about how to craft  
5 relief will apply in other cases where it's not  
6 so necessary, what would you say, what would you  
7 do to ensure that that did not take place, to  
8 essentially cabin this kind of relief to the  
9 peculiar circumstances of this case?

10 GENERAL PRELOGAR: I think it would be  
11 appropriate to cabin it in two ways.

12 First, in recognition that ordinarily  
13 it is far more appropriate to enjoin the  
14 upstream enforcement agents who would be  
15 bringing cases to the court in the first  
16 instance. That is the ordinary way that an Ex  
17 parte Young action proceeds. And if the state  
18 had not specifically sought to thwart that  
19 mechanism here by outsourcing the enforcement  
20 authority to the general public, that kind of  
21 injunction would have been appropriate.

22 The -- the problem is that the state  
23 has specifically, by delegating to members of  
24 the general public this enforcement authority,  
25 it's specifically made it impossible to

1 determine in advance who was going to become an  
2 S.B. 8 plaintiff, who was going to actually  
3 choose to file suit. And I think, in that  
4 circumstance, injunctive relief that prevents  
5 the state court proceedings from going forward  
6 is appropriate.

7           And then the second limitation that I  
8 think the Court could articulate is that this is  
9 the rare case where the mere existence or threat  
10 of the litigation is itself causing the  
11 constitutional harm. It's the flood of S.B. 8  
12 enforcement suits that could be filed that is  
13 chilling the exercise of the constitutional  
14 right today. And it's not normally the case in  
15 an ordinary suit that the mere prospect that  
16 there could be a case filed would create this  
17 kind of profound harm and chilling effect on  
18 constitutional rights.

19           But that was Texas's intent here.  
20 That was its clear purpose. And it's the actual  
21 effect because right now in Texas that  
22 constitutionally protected care is not  
23 available.

24           JUSTICE ALITO: You know, General, I  
25 -- I appreciate your point. Texas says, you

1 say, has done everything it possibly can to try  
2 to make it difficult for abortion providers to  
3 vindicate their rights under our precedents.

4 I -- I get it. I think it's a  
5 forceful argument. But I think we have to be  
6 concerned about the implications of the  
7 mechanisms that you propose for providing some  
8 kind of relief. A lot of your brief and all the  
9 other briefs that have been -- that have been  
10 filed against Texas in both of these cases  
11 suggest that we should issue a rule that applies  
12 just to this case.

13 But that's inconsistent with the rule  
14 of law. We -- if we decide a -- when we decide  
15 a case, the rule that we establish should apply  
16 to everybody who's similarly situated.

17 And if you look at the particulars of  
18 the enforcement mechanisms, they are  
19 unprecedented and they provide cause for  
20 concern. And so I -- I'd really like to hear  
21 your explanation about why they're appropriate  
22 and how they can be limited to this case.

23 Start with the judges. It's  
24 unprecedented and it is contrary to our system  
25 of federalism to enjoin a state judge even from

1 hearing a case. When has that been done and how  
2 can that be justified?

3 The judge is a neutral arbiter. The  
4 judge is -- is bound to apply the Constitution.  
5 How can you say -- how can you enjoin a judge  
6 from performing a lawful act, which is the  
7 adjudication of a case that is filed before the  
8 judge?

9 GENERAL PRELOGAR: Well, I want to be  
10 perfectly precise that in our case, the district  
11 court enjoined Texas and found that that  
12 injunction could properly reach the state court  
13 personnel who would be then exercising the  
14 state's authority.

15 JUSTICE ALITO: Well, Texas is an  
16 abstract entity, and any -- an injunction has to  
17 apply to people. Yes, there are instances where  
18 a state has been enjoined, and what that means  
19 is that everybody under the control of, let's  
20 say, the state who has -- everybody who has to  
21 follow what the state attorney general says has  
22 to comply. And the state can pick -- you know,  
23 can -- can work out the -- the -- the -- the way  
24 that would work. But that doesn't apply to  
25 state court judges.



1           GENERAL PRELOGAR: While I certainly  
2 acknowledge, Justice Alito, that an injunction  
3 that would bind state court judges is extremely  
4 rare, it's not unheard of, and I think, in the  
5 unprecedented facts of this case, it's  
6 appropriate relief. And --

7           JUSTICE ALITO: Well, judges have been  
8 enjoined --

9           GENERAL PRELOGAR: -- and the reason  
10 for that is --

11           JUSTICE ALITO: -- let me just  
12 interrupt you -- judges have been enjoined from  
13 performing unlawful acts. But, here, the act  
14 that they are enjoined from performing is a  
15 lawful act. How can that be justified?

16           Let me give you this example. Suppose  
17 a -- an action is brought under S.B. 8 in  
18 federal court pursuant to diversity  
19 jurisdiction. Let's say a -- a -- a woman sues  
20 a doctor who has flown in from another state to  
21 perform the abortion.

22           Would the district judge in this case  
23 have the authority to enjoin another district  
24 judge from even hearing that case?

25           GENERAL PRELOGAR: No, I don't think

1 that the injunction could properly reach the  
2 federal system. I -- I don't think that there  
3 is any realistic possibility that any of these  
4 suits could possibly proceed in federal court  
5 because the distinct feature of S.B. 8 is that  
6 the plaintiffs who are authorized to sue need  
7 not have any injury or suffer any harm from the  
8 prohibited abortions.

9 And so I think the idea that there  
10 would be a proper basis for Article III  
11 jurisdiction is lacking.

12 JUSTICE ALITO: Well, it's certainly  
13 possible to think of -- think of cases where  
14 there would be federal jurisdiction. A woman  
15 sues an out-of-state doctor in diversity under  
16 S.B. 8 for physical or emotional harm suffered  
17 as a result of the abortion. There's injury in  
18 fact, and the amount in controversy could be  
19 met.

20 So your answer is one federal judge  
21 can't enjoin another federal judge, but a  
22 federal judge can enjoin state judges because  
23 they're -- they're lower creatures. That's the  
24 answer?

25 GENERAL PRELOGAR: That -- that is not

1 what I mean to suggest. Here, the injunction  
2 runs against Texas, and the state court judges  
3 in Texas are being utilized by Texas to  
4 effectively create an apparatus that is so  
5 lopsided, so procedurally anomalous, and so  
6 hostile to constitutionally protected conduct  
7 that the mere existence of the suits, no matter  
8 how the judges adjudicate them, create the  
9 constitutional harm by chilling the conduct.

10 And so we are not suggesting that --  
11 that the judges would do anything other than  
12 actually follow federal law here. We think each  
13 and every one of these S.B. 8 suits would  
14 inevitably be dismissed because the statute is  
15 so clearly unconstitutional, but that doesn't  
16 remedy the constitutional --

17 JUSTICE GORSUCH: So -- so --

18 GENERAL PRELOGAR: -- harm because the  
19 constitutionally protected care isn't being  
20 provided in the first place.

21 JUSTICE GORSUCH: General, to -- to  
22 achieve this injunction against state courts, do  
23 we also have to overrule Ex parte Young, where  
24 we said -- and I'll just quote the relevant bit  
25 I've got before me -- it's: "An injunction

1 against a state court would be a violation of  
2 the whole scheme of our government. The  
3 difference between a power to enjoin an  
4 individual from doing certain things and the  
5 power to enjoin courts from proceeding in their  
6 own way to exercise jurisdiction is plain, and  
7 no power to do the latter exists because of the  
8 power to do the former."

9 So do -- do we have to overrule at  
10 least that aspect of -- of *Ex parte Young*?

11 GENERAL PRELOGAR: No, Justice  
12 Gorsuch. I think that that aspect of *Ex parte*  
13 *Young* has to be read in the context of the  
14 Court's recognition there and the whole thrust  
15 of the opinion that the appropriate relief would  
16 run --

17 JUSTICE GORSUCH: No, I --

18 GENERAL PRELOGAR: -- against the  
19 enforcement agents themselves.

20 JUSTICE GORSUCH: -- I understand  
21 that, and that was Justice Breyer's point  
22 earlier. But -- but *Ex parte Young* also said  
23 this. And -- and I think that's just -- am I  
24 wrong? How do you reconcile saying you can  
25 never enjoin a court with saying you can here?

1 Isn't -- something has to give, doesn't it?

2           GENERAL PRELOGAR: While I certainly  
3 think that it is not uncommon in equity to have  
4 relief that is targeted to prevent a suit in law  
5 from proceeding, I acknowledge it's unusual to  
6 have that relief run against the judges  
7 themselves, and if this Court has concerns with  
8 that approach, I think that the Court could  
9 rightly recognize that the remedy here could  
10 focus on the clerks engaged in the ministerial  
11 task of docketing the cases and, as our  
12 injunction does, against the -- the S.B. 8  
13 plaintiffs, who are actually exercising the  
14 court's enforcement authority.

15           But I do think that the Court's  
16 statement in *Ex parte Young* has to be read  
17 against the backdrop of this Court's recognition  
18 that there would be otherwise effective relief  
19 available. And what we're confronting here is a  
20 situation where it's very difficult to find that  
21 effective relief by design because the Texas --  
22 because Texas designed the law specifically to  
23 thwart it.

24           JUSTICE GORSUCH: General, do you  
25 agree that there are instances in which no

1 federal forum is available to adjudicate a  
2 federal right?

3 GENERAL PRELOGAR: Yes, I do agree  
4 that that is sometimes the case, and --

5 JUSTICE GORSUCH: Do you also agree  
6 that it's sometimes the case that a federal  
7 right can only be enforced defensively and not  
8 in a pre-enforcement challenge?

9 GENERAL PRELOGAR: Yes, that can be  
10 the case.

11 JUSTICE ALITO: Can you tell us what  
12 are the elements that must be necessary for you  
13 to have -- to seek the kind of equitable relief  
14 that you are seeking here?

15 It -- would it be limited to cases  
16 where every single one of the characteristics of  
17 S.B. 8 that you mentioned are present? Must  
18 they all be present? And if that is the case,  
19 is this really what you're seeking, a rule for  
20 one case?

21 GENERAL PRELOGAR: I don't want to  
22 suggest that every single feature of S.B. 8  
23 would necessarily have to be replicated, but I  
24 think that the overall inquiry would have to  
25 focus on whether the state has deliberately

1 sought to prevent any effective means of  
2 judicial review.

3           And, here, we have it both with  
4 respect to federal court -- of course, the state  
5 has sought to supplant the traditional 1983  
6 action, Ex parte Young action -- but we have it  
7 on the back end as well, where the state is  
8 trying to purposefully make these S.B. 8  
9 enforcement proceedings so anomalous,  
10 procedurally anomalous, and feature rules that  
11 are so stacked in favor of plaintiffs and  
12 defendants that -- that the clear purpose and  
13 actual effect has been to chill the right.

14           And I think that this is a response to  
15 Justice Gorsuch's questions as well because,  
16 although it is true that sometimes there's not a  
17 federal forum to raise a federal claim, for  
18 example, with defamation, it's not the case that  
19 in those circumstances the state court  
20 proceedings are heavily weighted in favor of the  
21 plaintiffs with the evident intent to chill the  
22 speech from occurring.

23           And -- and the proof is in how this  
24 has actually worked in practice, because  
25 defamation actions haven't meant that no speech

1 occurs.

2 JUSTICE GORSUCH: Well, counsel, but  
3 we -- we -- we -- we've created a whole  
4 substantive law of defamation out of concern for  
5 chilling effects. And why -- why, on that  
6 theory, wouldn't we go one step further? For  
7 all the reasons you've provided -- they're good  
8 reasons, and I think Justice Alito said they're  
9 strong arguments -- why wouldn't we do the same  
10 thing for that other very vital and important  
11 right or -- or the Second Amendment right or the  
12 right to free exercise of religion?

13 They're all -- we don't get to pick  
14 and choose among our rights. We're supposed to  
15 enforce them all equally. Why does this one get  
16 special treatment?

17 GENERAL PRELOGAR: This law is  
18 different because it has taken the ordinary  
19 state court mechanism that might be an  
20 appropriate way to vindicate the rights,  
21 whatever they are, and it's purposefully sought  
22 to --

23 JUSTICE GORSUCH: But you'd agree --

24 GENERAL PRELOGAR: -- obstruct that.

25 JUSTICE GORSUCH: -- you'd agree that



1 tort laws for defamation have a chilling effect?

2 GENERAL PRELOGAR: Yes, but they  
3 haven't chilled speech --

4 JUSTICE GORSUCH: And you'd agree that  
5 --

6 GENERAL PRELOGAR: -- out of  
7 existence.

8 JUSTICE GORSUCH: -- that gun control  
9 laws also have a chilling effect?

10 GENERAL PRELOGAR: They can, but not  
11 --

12 JUSTICE GORSUCH: And -- and you'd  
13 agree --

14 GENERAL PRELOGAR: -- in the same way  
15 that S.B. 8 operates.

16 JUSTICE GORSUCH: -- as well that laws  
17 restricting the exercise of religion can have a  
18 chilling effect?

19 GENERAL PRELOGAR: I'm not denying,  
20 Justice Gorsuch, that -- that those kinds of  
21 laws can have some measure of chilling effect on  
22 the margins, but they look nothing like this  
23 law.

24 JUSTICE KAGAN: You're not suggesting,  
25 General Prelogar, that this right is different,

1 are you? If this exact law were promulgated --  
2 were -- were -- were issued by a state that  
3 wanted to be hostile to gun rights, your  
4 argument would be the same, would it not?

5 GENERAL PRELOGAR: It would be exactly  
6 the same because the threat here is to the  
7 supremacy of federal law that's accomplished by  
8 trying to cut off the channels of judicial  
9 review that Congress recognized in Section 1983  
10 would be vital to vindicating federal rights,  
11 whether that's Second Amendment rights or rights  
12 to religious liberty or, here, the right to  
13 abortion.

14 JUSTICE ALITO: Well, does it -- does  
15 it matter that it's the abortion right? How  
16 about the issue of severability? You want to  
17 enjoin every action that's brought under S.B. 8  
18 even though some of them would not violate Roe  
19 or Casey.

20 And I guess the justification for that  
21 is that in the abortion context, as we held in  
22 the prior Whole Woman's Health case,  
23 severability doesn't count. Normally, we pay  
24 attention to severability clauses, but I guess,  
25 when it's abortion, if there's one provision of

1 a statute that's unconstitutional, the whole  
2 thing sinks. Is that your position?

3 GENERAL PRELOGAR: Well, our position  
4 is that the district court rightly applied this  
5 Court's decision in Whole Woman's Health versus  
6 Hellerstedt and concluded that it would  
7 effectively amount to legislative work to walk  
8 through S.B. 8 and try to parse it provision by  
9 provision and application by application to  
10 determine which applications would be  
11 constitutionally permissible, but --

12 JUSTICE ALITO: Well, is that -- is  
13 that what you want us to do? If we find one  
14 provision of some massive federal statute  
15 unconstitutional down the road, well, it's too  
16 much work to go through them all; we're just  
17 going to strike down the whole thing. Do you  
18 want us to do that?

19 GENERAL PRELOGAR: The difference  
20 here, I think, that the district court  
21 recognized is that it would actually require  
22 rewriting the statute to try to reach those  
23 lawful applications. And I think, in  
24 particular, in this preliminary injunction  
25 posture, where the court was acting on an

1 emergency basis, that kind of parsing wasn't  
2 necessary.

3 But, if this Court disagreed, I think  
4 all that would show is that the court should  
5 confine the injunction to the applications that  
6 are unlawful under Casey and Roe and make clear  
7 that the only acceptable implementation of this  
8 would be with respect to post-viability  
9 abortions.

10 And, of course, Texas already  
11 separately prohibits post-viability abortions.  
12 The providers don't provide them. So I don't  
13 think that that would have any actual real-world  
14 effect.

15 JUSTICE BREYER: Can you go back to  
16 Justice Thomas's question? Imagine those  
17 columns there are filled with the California  
18 Civil Code, and let's take out those parts that  
19 don't deal with private people, so what we have  
20 are property and torts and so forth. And  
21 someone in your office says: I've been reading  
22 that, don't ask me why, but I found 19  
23 provisions here that I think are  
24 unconstitutional, let's go bring a case.

25 Now, if we accept your argument, I

1 guess that person has a good point. I'm a  
2 little nervous. So far, what you've said to  
3 distinguish this one is you've said but, here,  
4 Texas purposefully did this. Boy, that raises a  
5 whole other set of issues, as you well know,  
6 when you say the legislative history counts, da,  
7 da, da, da, da, okay?

8 Ah, but you say, but they're not  
9 giving a good -- a good forum in the state to  
10 test out the constitutionality. And now I think  
11 about the California Civil Code or the Procedure  
12 Code or 15 other things, I don't know. You  
13 know? Is that the test?

14 Have you sat down and thought through  
15 what are the implications of the test, or is it  
16 that the federal government, no matter who's in  
17 charge, without a statute, whatever party,  
18 whatever president, can just go and intervene in  
19 any case, can bring a federal case whenever they  
20 think a state law affecting private people is  
21 unconstitutional? And if not, what's the test?

22 GENERAL PRELOGAR: No, Justice Breyer,  
23 we are not urging a broad authority to bring a  
24 suit like this in the circumstances that you  
25 identified. And I think that there are two

1 critical distinctions here that separate those  
2 circumstances from the ones we confront with  
3 S.B. 8.

4 First, here, it is perfectly clear  
5 that Congress intended to have a federal court  
6 forum for the vindication of this type of claim  
7 through Section 1983, and the state is  
8 purposefully trying to manipulate it through the  
9 delegated enforcement authority and avoid that  
10 federal court forum.

11 And, second, with respect to the state  
12 court proceedings, it's not just that these  
13 proceedings, in my estimation, deny a fair  
14 forum. It's that by their very design, with  
15 respect to each and every procedural and  
16 substantive rule, they -- they display open  
17 hostility to federal rights and try to prevent  
18 any effective forum to get statewide relief,  
19 declaring this law in violation of this Court's  
20 precedents.

21 CHIEF JUSTICE ROBERTS: Thank you,  
22 counsel.

23 I share some of the concerns that have  
24 been voiced by my colleagues. You say this case  
25 is very narrow, it's rare, it's -- it's -- it's

1 particularly problematic. But the authority you  
2 assert to respond to it is as broad as can be.  
3 It's equity, you say. We have the authority to  
4 sue states under equity, which is a limitless  
5 ill-defined authority.

6           And I just wonder -- I know you've  
7 been asked this question before, but if you  
8 could repeat your answer -- what is the limiting  
9 principle? When we get another case down the  
10 road where it's a different solicitor general  
11 who's making this argument in a different case,  
12 what are we going to be able to point to that  
13 says no, no, you can't invoke that broad equity  
14 power, or you can't say just because there's a  
15 state statute that is enforced by private  
16 parties, which is a very common phenomenon, that  
17 you then get to sue -- sue the states?

18           GENERAL PRELOGAR: Well, Mr. Chief  
19 Justice, the equitable remedy that we're seeking  
20 here is not limitless. It is the traditional  
21 remedy of enjoining implementation of an  
22 unconstitutional law. And the limiting  
23 principle that will govern --

24           CHIEF JUSTICE ROBERTS: Well, it's  
25 hardly traditional to get injunctions against

1 judges, injunctions against clerks, injunctions  
2 against everybody, right? That's part of the  
3 relief you seek, isn't it? People -- anybody  
4 can bring one of these suits, so you're seeking  
5 an injunction against the world, right?

6 GENERAL PRELOGAR: No, we're seeking  
7 an injunction against those who actually choose  
8 to involve themselves in the constitutional  
9 violation by filing suit. So it's not the --

10 CHIEF JUSTICE ROBERTS: Well, anybody  
11 -- anybody can -- can do that. But anyway --  
12 I'm sorry.

13 GENERAL PRELOGAR: It's true. I -- I  
14 just wanted to be very clear that the injunction  
15 doesn't apply to the potential plaintiffs, only  
16 to the actual plaintiffs.

17 But, to try to address the concern  
18 you've raised, I think that, here, the limiting  
19 principle arises from the way this statute  
20 operates to try to deprive any meaningful review  
21 anywhere, whether in -- in federal court at the  
22 outset, whether in state court on the back end  
23 through the enforcement proceedings.

24 And I recognize that this seems like a  
25 novel case, and that's because it's a novel law.



1                   But we do not think that a recognition  
2 here that the United States can -- can intervene  
3 to try to protect the supremacy of federal law  
4 would open the floodgates in the mine-run  
5 situations where a state is simply applying a  
6 private right of action through ordinary and  
7 fair state court proceedings.

8                   CHIEF JUSTICE ROBERTS: Justice  
9 Thomas?

10                   JUSTICE THOMAS: No questions, Chief.

11                   CHIEF JUSTICE ROBERTS: Justice  
12 Breyer?

13                   Justice Alito?

14                   JUSTICE ALITO: As to the potential  
15 private plaintiffs, how can they be bound under  
16 Rule 65 of the Federal Rules of Civil Procedure?  
17 With what party are they acting in concert?

18                   GENERAL PRELOGAR: They're acting in  
19 concert with the State of Texas, which has  
20 created the bounty that incentivizes their  
21 conduct and has created the apparatus through  
22 the enforcement proceedings that allow them to  
23 -- to perpetuate --

24                   JUSTICE ALITO: With the --

25                   GENERAL PRELOGAR: -- this

1 constitutional violation.

2 JUSTICE ALITO: -- with the state, not  
3 -- with the state, not with any individual who  
4 is a party?

5 GENERAL PRELOGAR: That's right. We  
6 believe that they act in concert with the state,  
7 which is the named defendant here, and bound by  
8 the injunction.

9 JUSTICE ALITO: So would any private  
10 plaintiff bringing any common law tort suit be  
11 acting in concert with the state under the laws  
12 of which that -- that claim is asserted?

13 GENERAL PRELOGAR: No, but there's a  
14 world of difference between an ordinary private  
15 right of action and the exercise of that kind of  
16 private enforcement and what S.B. 8  
17 contemplates.

18 JUSTICE ALITO: No, I understand that.

19 GENERAL PRELOGAR: And I think the  
20 best example --

21 JUSTICE ALITO: But why -- but why is  
22 the question whether they're acting in concert  
23 with the state any different? Here, they're  
24 acting in concert with Texas, you say, because  
25 they are bringing suit under a Texas law.

1           So, if somebody brings suit in  
2 Maryland under Maryland defamation law, they're  
3 acting in concert with Maryland, is that right?

4           GENERAL PRELOGAR: No. And -- and  
5 we're not suggesting that every private right of  
6 action is governed by these same principles, but  
7 the key difference here is that the individuals  
8 who are S.B. 8 plaintiffs are actually  
9 exercising the state's own enforcement  
10 authority.

11           This is not meant to remedy some  
12 private harm that those individuals suffered.  
13 And I think that the best example or  
14 illustration of that is that the \$10,000-plus  
15 bounty that the state has created is only  
16 available to the first comer.

17           And so the suggestion that was made  
18 earlier by Texas that this could be some redress  
19 for personnel outrage, I think, is inconsistent  
20 with how the scheme is structured. This is  
21 meant to simply function as a method of  
22 encouraging the suits to be filed on the state's  
23 behalf, and in that circumstance, we think it  
24 can qualify as active concert --

25           JUSTICE ALITO: Well --

1                   GENERAL PRELOGAR:  -- or  
2 participation.

3                   JUSTICE ALITO:  -- the -- the Texas  
4 constitution requires injury in fact, and this  
5 statute, as I understand it, permits an award of  
6 actual damages in addition to the liquidated  
7 damages, and there's nothing particularly  
8 unusual about a statute that provides for  
9 liquidated damages.  So I don't understand your  
10 answer at all.

11                  GENERAL PRELOGAR:  Well, Justice  
12 Alito, if that's what the statute was attempting  
13 to accomplish, then, presumably, it would apply  
14 those liquidated damages to every single S.B. 8  
15 plaintiff.  It wouldn't limit it to just the  
16 first person who is able to effectively bring to  
17 bear the coercive force of the state's  
18 enforcement authority.

19                  And so the suggestion here that the  
20 \$10,000 is meant to provide a presumptive dollar  
21 amount on personal injury, I think, is  
22 inconsistent with how the statute operates.

23                  JUSTICE ALITO:  All right.  So one  
24 final question.  The -- the federal rules do  
25 provide a mechanism for you to do what I gather

1 you're trying to do with respect to these  
2 potential private plaintiffs, and that is to  
3 certify a defendant class.

4 Did you try to do that? Have you  
5 satisfied the requirements of Rule 23 to do  
6 that?

7 GENERAL PRELOGAR: We did not try to  
8 do that. And, again, I think this relates to my  
9 answer to the Chief Justice that the injunction  
10 doesn't reach the world at large or every  
11 possible person, the anyone anywhere who is  
12 authorized under this law to bring suit.

13 Instead, it's narrowly focused on  
14 those individuals who choose affirmatively to  
15 exercise the enforcement authority by filing  
16 suit.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Sotomayor?

19 JUSTICE SOTOMAYOR: What -- what  
20 happens to your lawsuit if we were to find that  
21 Whole Woman's Health is justiciable?

22 GENERAL PRELOGAR: I think that that  
23 wouldn't retroactively operate to extinguish the  
24 sovereign injury that the United States  
25 experienced when Texas passed this law and

1 clearly attempted to thwart judicial review at a  
2 time when the law was unsettled.

3 But I do think that if this Court  
4 clarified in Whole Woman's Health that the  
5 providers can move forward with their suit and  
6 if it forcefully rejected Texas's effort here to  
7 stymie that kind of federal court review, then  
8 we wouldn't have the same sovereign interest in  
9 a future case because, at that point, the law  
10 would be settled and this attempt at  
11 circumvention would clearly not work, and so it  
12 wouldn't --

13 JUSTICE SOTOMAYOR: They can't sue the  
14 state the way you can because of sovereign  
15 immunity. So one of the big issues for them --  
16 and I'm not asking you to litigate their case,  
17 but I'm asking for your views of how it affects  
18 yours -- is who do they sue?

19 They haven't sued, like you have, all  
20 S.B. 8 plaintiffs who file suit. They've sued a  
21 clerk of the court, a judge, and a attorney  
22 general and other state officials.

23 So how do they get the relief that  
24 you're seeking? You've heard Justice Thomas --  
25 Justice Alito say not everybody has been named

1 because the S.B. 8 plaintiffs have not been  
2 named. So how can they be bound?

3 GENERAL PRELOGAR: That's right,  
4 Justice Sotomayor. And I think that that  
5 reflects that the relief that we're seeking is  
6 in some respects different than the relief that  
7 the providers could obtain in their suit because  
8 they don't have a mechanism to identify or sue  
9 the S.B. 8 plaintiffs. Here, our injunction can  
10 rightly reach those plaintiffs because the State  
11 of Texas is subject to our suit and then the  
12 plaintiffs can be bound under Rule 65.

13 I think that the providers, therefore,  
14 have rightly focused on trying to target the  
15 aspect of the enforcement proceedings that  
16 create the harm through the filing of the cases  
17 in the first place, and I understand that to be  
18 the basis of their request that the Court  
19 recognize their claim as against the clerk  
20 class.

21 JUSTICE SOTOMAYOR: Thank you.

22 CHIEF JUSTICE ROBERTS: Justice Kagan?

23 JUSTICE KAGAN: Well, is it also  
24 possible that in this Whole -- in the Whole  
25 Woman's Health suit that the AG could stand in

1 for the individual plaintiffs in the way that in  
2 your suit the state essentially stands in for  
3 the individual plaintiffs?

4 GENERAL PRELOGAR: I think that is  
5 possible, Justice Kagan. And so, if this Court  
6 concluded that the AG of Texas could properly be  
7 enjoined here in the provider suit, then that  
8 effectively, I think, would pierce the fiction  
9 here that the state has tried to create by  
10 delegating the AG's enforcement authority to the  
11 world at large and could rightly try to target  
12 that aspect of the enforcement scheme.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Gorsuch?

15 JUSTICE GORSUCH: General, are you  
16 aware of a -- of a precedent that permits an  
17 injunction against all persons in -- in -- in  
18 the country or the world, the cosmos, who bring  
19 suit?

20 GENERAL PRELOGAR: No, Justice  
21 Gorsuch.

22 JUSTICE GORSUCH: So this --

23 GENERAL PRELOGAR: Our injunction  
24 doesn't do that either.

25 JUSTICE GORSUCH: But you said it --



1 against anyone who brings suit, right? So I did  
2 include that in my limitation. Am I missing  
3 something?

4 GENERAL PRELOGAR: Just to be clear --  
5 and I -- I'm sorry if I wasn't clear about this  
6 before -- we understand the injunction only to  
7 bind those individuals who choose to file suit.

8 JUSTICE GORSUCH: Who bring suit.

9 GENERAL PRELOGAR: And so that --

10 JUSTICE GORSUCH: Yeah, that's my  
11 question.

12 GENERAL PRELOGAR: -- at that point,  
13 they would be identifiable.

14 JUSTICE GORSUCH: And I'm asking you,  
15 counsel, are you aware of any other example of  
16 such a -- such an injunction?

17 GENERAL PRELOGAR: With that specific  
18 term, I -- I can't cite one to you. Again --

19 JUSTICE GORSUCH: Not in the --

20 GENERAL PRELOGAR: -- that's because  
21 this --

22 JUSTICE GORSUCH: -- history of the  
23 United States, you can't -- you can't identify  
24 one for us, right?

25 GENERAL PRELOGAR: In the history of

1 the United States, no state has done what Texas  
2 has done here.

3 JUSTICE GORSUCH: All right. And  
4 then, with respect to those individuals who  
5 would be bound, could they -- could they, for  
6 filing a -- a lawsuit and in -- in defiance of  
7 it and then maybe filing a discovery request or  
8 taking some other action, be held in -- in -- in  
9 criminal contempt?

10 GENERAL PRELOGAR: They couldn't be  
11 held in contempt without receiving notice and an  
12 opportunity to be heard. And so I think that  
13 they would have an opportunity --

14 JUSTICE GORSUCH: There's always that  
15 opportunity to be heard before criminal contempt  
16 proceedings. But could they then be held in  
17 criminal contempt, consistent with procedural  
18 due process?

19 GENERAL PRELOGAR: Yes. So long as  
20 they had notice of the injunction, they could  
21 be.

22 JUSTICE GORSUCH: Oh, so, if they  
23 didn't have notice of an injunction, then you're  
24 saying contempt is not possible?

25 GENERAL PRELOGAR: That's correct.

1 JUSTICE GORSUCH: Okay. Are you aware  
2 of another circumstance where an injunction's  
3 been issued where contempt's not possible?

4 GENERAL PRELOGAR: Well, Justice  
5 Gorsuch, I think, in any circumstance where  
6 someone didn't have notice of an injunction,  
7 contempt wouldn't be possible. That's where the  
8 measurable --

9 JUSTICE GORSUCH: Is the answer no,  
10 counsel, you're not aware of one?

11 GENERAL PRELOGAR: I think that it's  
12 actually every injunction operates that way.

13 JUSTICE GORSUCH: Because every other  
14 injunction provides notice in advance, and this  
15 one doesn't, so this one uniquely alone wouldn't  
16 allow for contempt proceedings. Is that your  
17 argument?

18 GENERAL PRELOGAR: No. The district  
19 court specifically tried to facilitate notice by  
20 providing that --

21 JUSTICE GORSUCH: Counsel, if you  
22 could answer my question, please. Are you  
23 saying that it can be entered without notice, an  
24 injunction could be entered without notice,  
25 you're not aware of one prior to that, and I'd

1 just like a straight answer as to whether those  
2 individuals in these circumstances could be held  
3 in criminal contempt or not.

4 GENERAL PRELOGAR: If they did not  
5 have notice of the injunction, then, no, they  
6 could not be.

7 JUSTICE GORSUCH: Okay. Then is this  
8 an advisory opinion saying don't file these  
9 things, we will throw them away, but we -- we  
10 have no contempt power to enforce the  
11 injunction?

12 GENERAL PRELOGAR: No, because the  
13 injunction does appropriately bind Texas and it  
14 does appropriately bind all of those individuals  
15 who exercise the state's enforcement  
16 authority --

17 JUSTICE GORSUCH: What is an --

18 GENERAL PRELOGAR: -- would be under  
19 the state judge.

20 JUSTICE GORSUCH: -- injunction  
21 without enforcement power?

22 GENERAL PRELOGAR: There would be  
23 enforcement power here both with respect to the  
24 state, with respect to the individuals who have  
25 actual notice and file these suits, with respect

1 to the court personnel who would violate the  
2 terms of the injunction, and with respect to the  
3 enforcement agents at the end of the day who  
4 would be enforcing these judgments.

5 JUSTICE GORSUCH: On -- on -- on the  
6 Debs question that the Chief Justice raised,  
7 just to press that a little bit further, an  
8 assertion of an equity right here, and I think  
9 Justice Thomas alluded to this too, has the  
10 United States Government ever before asserted  
11 this equity right to protect individual rights  
12 in any other state ever?

13 GENERAL PRELOGAR: Well, I want to be  
14 clear that the right that we're asserting here  
15 is to protect the supremacy of federal law. So  
16 we're not asserting --

17 JUSTICE GORSUCH: And I'm asking have  
18 you ever done that in -- in -- to -- to defend  
19 the supremacy of individual rights in any other  
20 situation anywhere in the country in our  
21 history?

22 GENERAL PRELOGAR: We have brought  
23 suit before. It -- it was a series of cases in,  
24 I believe, the 1970s that did not work their way  
25 up to this Court. The United States urged a

1 broader theory there to be able to sue to  
2 vindicate constitutional rights generally.

3 But that's not the argument that we're  
4 making here. Instead, we are arguing --

5 JUSTICE GORSUCH: Okay.

6 GENERAL PRELOGAR: -- a specific thing  
7 that gives us --

8 JUSTICE GORSUCH: Besides that one  
9 suit, are you aware of any others?

10 GENERAL PRELOGAR: No. I believe  
11 there were three suits in that line.

12 JUSTICE GORSUCH: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice  
14 Kavanaugh?

15 JUSTICE KAVANAUGH: General, in the  
16 prior case, the plaintiffs would be the same  
17 plaintiffs. If it were an ordinary Ex parte  
18 Young situation, General Stone would be  
19 representing a state DA or a state executive  
20 official. We'd have arguments about the merits,  
21 which we're obviously not dealing with today,  
22 but it would be the same basic situation. There  
23 is an extension of Ex parte Young to get to the  
24 prior case, as we talked about, and that's an  
25 important step that we have to analyze.

1           Your case, by contrast, though, seems  
2 -- and I'm probably repeating others' questions  
3 -- just different and irregular and unusual, and  
4 we don't know where it goes.

5           And I just -- if you could fill in --  
6 and maybe this will be repetitive -- but you  
7 think the U.S. has authority to bring a suit  
8 like this against any state law that?

9           GENERAL PRELOGAR: That violates this  
10 Court's precedents and tries to shield that  
11 violation from any effective judicial review in  
12 federal or state court.

13           And I recognize, Justice Kavanaugh,  
14 that this is an unusual suit. The United States  
15 does not lightly invoke an authority like this  
16 to sue a state. The reason we've done it here  
17 is because S.B. 8 is so unprecedented,  
18 extraordinary, and extraordinarily dangerous for  
19 our constitutional structure.

20           If Texas is correct that it can  
21 nullify this Court's precedents and it can  
22 successfully evade the mechanisms that this  
23 Court recognized in *Ex parte Young* and Congress  
24 recognized in Section 1983, then no  
25 constitutional right is safe.

1           And we think that in this  
2 extraordinary circumstance, the United States  
3 has a sovereign interest in intervening to  
4 protect the supremacy of federal law.

5           JUSTICE KAVANAUGH: What if our  
6 precedent on something in a different area of  
7 law altogether was just uncertain, there was an  
8 open question about something, and a state  
9 wanted to kind of cabin, draw a line with  
10 respect to the precedent? Would the U.S. have  
11 the authority there? Is there something about  
12 what you think is the clarity of the violation  
13 here that triggers your authority?

14          GENERAL PRELOGAR: If the state  
15 structured that hypothetical law in this same  
16 way, then we would have the same concern that  
17 the state is effectively seeking to take the  
18 issue away from the courts.

19          And so you can imagine a circumstance  
20 where a right is more unsettled. Imagine, for  
21 example, in a pre-Heller circumstance, the right  
22 to possess handguns in the home. If D.C. had  
23 enacted a law that deputized members of the  
24 general public to seek these kinds of suits  
25 against that conduct, even before the Court had



1 clarified the right, I think that that would  
2 have raised the same concern that effectively  
3 the -- the state is seeking to box the judiciary  
4 out of being the final arbiter of constitutional  
5 rights.

6 Now I will say that I think that a  
7 state is far less likely to engage in this kind  
8 of mechanism with an unsettled right because it  
9 would think that its law is constitutional, and  
10 I would assume that it would want to  
11 forthrightly defend it and get a -- a court  
12 ruling that confirms that point.

13 But, if a state instead sought to  
14 shield the law through this mechanism, it would  
15 raise a supremacy clause concern.

16 JUSTICE KAVANAUGH: Thank you.

17 CHIEF JUSTICE ROBERTS: Justice  
18 Barrett?

19 JUSTICE BARRETT: I just want to  
20 follow up briefly on the questions that Justice  
21 Kagan and Justice Sotomayor were asking you  
22 about what happens to your suit if the  
23 plaintiffs in the Whole Woman's Health suit  
24 prevail.

25 Let's imagine that they do prevail on

1 a theory that the attorney general has this  
2 residuum of authority and that the private  
3 parties can be bound as state actors pursuant to  
4 Rule 65.

5           You told Justice Sotomayor that then  
6 the United States' interests would not dissipate  
7 even in that scenario. And I guess I didn't  
8 understand that. You -- you phrased it, I  
9 think, in the past tense, that that wouldn't  
10 cure the affront to sovereignty that was already  
11 there. But, you know, the -- the force of your  
12 argument for equity here is the inadequacy of a  
13 remedy at law because of the way that Texas has  
14 cut off access to the Ex parte Young remedy.

15           So could you just explain to me why  
16 your suit would continue to be alive or why  
17 there would be an argument in favor of it if  
18 Justice Sotomayor's hypothetical were in play?

19           GENERAL PRELOGAR: Yes. Of course,  
20 Justice Barrett. And I appreciate the chance to  
21 clarify.

22           I don't mean to suggest that the suits  
23 wouldn't interact with each other with respect  
24 to what kind of equitable relief would be  
25 appropriate. I understood Justice Sotomayor to

1 be asking me whether our suit is effectively  
2 contingent on the Whole Woman's Health  
3 litigation.

4           And my response was that you have to  
5 measure the sovereign injury here at the time  
6 the statute was enacted. And when the statute  
7 was enacted, it was clear that Texas was seeking  
8 to deprive others of having an opportunity to --  
9 to go to federal court for a remedy. The law  
10 was unsettled. And it was apparent and, in  
11 fact, has been the effect that Texas has  
12 succeeded in being able to nullify the right  
13 currently while these cases are working their  
14 way through the courts.

15           But I do think that if this Court  
16 provided guidance in Whole Woman's Health and  
17 made clear that a state cannot succeed with what  
18 Texas has attempted to do here, then we wouldn't  
19 have that same circumvention concern in the  
20 future.

21           But, in all candor, the concern is  
22 that then a state might treat -- seek to  
23 legislate around whatever the Whole Woman's  
24 Health decision says. It might try to tweak its  
25 enforcement mechanism in some way to get around

1 that ruling. And I think that what that shows  
2 is that when a state attempts to thwart judicial  
3 review and creates that possibility, that the  
4 supremacy of this Court's decisions will not be  
5 respected, the United States may sue in equity  
6 to redress that harm.

7 JUSTICE BARRETT: So it would be kind  
8 of a pile-on injunction? Like they would have  
9 an injunction against the attorney general and  
10 the private plaintiffs acting, you know, as  
11 state actors, and then we would also enjoin --  
12 let's say that we didn't want to enjoin the  
13 clerks and the entire apparatus of the state.  
14 Let's say that we thought you too, in getting an  
15 injunction against the State of Texas, could  
16 really only obtain one against the executive  
17 officials who had enforced the law.

18 You're asking just for the same  
19 injunction in your suit but just acknowledging  
20 that the United States has the ability to bring  
21 this kind of In re Debs suit?

22 GENERAL PRELOGAR: Well, I think that  
23 it's important to separate out the question of  
24 authority to sue with what kind of relief might  
25 be appropriate. So we do think that when we

1 filed this suit -- and at that point, of course,  
2 there was no relief being provided on the ground  
3 in Texas, this law had taken effect and it had  
4 chilled a constitutionally protected right out  
5 of existence -- that at that point we were  
6 authorized to bring suit.

7 The question of what the appropriate  
8 remedy would be, I think, is a separate one, and  
9 I think it very well could be the case that  
10 there would not be a need for duplicative  
11 injunctive remedies in both of these cases, but  
12 that's a separate and distinct question from  
13 whether we could sue in the first place.

14 JUSTICE BARRETT: Thank you.

15 CHIEF JUSTICE ROBERTS: Thank you.

16 General Stone, welcome back.

17 ORAL ARGUMENT OF JUDD E. STONE, II,

18 ON BEHALF OF THE STATE RESPONDENT

19 MR. STONE: It's been a long time.

20 (Laughter.)

21 MR. STONE: Thank you again, Mr. Chief  
22 Justice, and may it please the Court:

23 The Department of Justice's suit  
24 offends the separation of powers by usurping for  
25 the executive branch the role Congress plays in

1 determining what cases may be heard and what  
2 remedies may be provided in the federal courts.

3 As discussed earlier this morning, no  
4 Texas official is a proper defendant in a  
5 pre-enforcement challenge to S.B. 8. The United  
6 States cannot cure that problem by naming the  
7 State of Texas as a nominal defendant and then  
8 asking for relief that runs against the same  
9 Texas officials that are inappropriate targets  
10 for an injunction under bedrock Article III and  
11 equitable principles.

12 Moreover, the United States is not a  
13 proper plaintiff. It cannot claim a sovereign  
14 interest in suing to enforce individual rights  
15 under Casey, and the remedy it seeks would be  
16 completely foreign to traditional equity.  
17 Congress must create such novel remedies if they  
18 are to exist at all. And Congress has impliedly  
19 rejected giving the United States such relief by  
20 providing other avenues to vindicate Fourteenth  
21 Amendment rights.

22 Like the petitioners in Whole Woman's  
23 Health, the United States asks this Court to  
24 disregard all of this because it deems S.B. 8 a  
25 novel solution for which this -- a novel problem

1 for which this Court must concoct a novel  
2 solution. Even if it were, and it is not, such  
3 a request must be directed to Congress.

4 The United States cannot seriously  
5 assert that the Constitution requires  
6 pre-enforcement federal judicial review. It  
7 opposes that result in virtually every other  
8 case. This Court should reject its request for  
9 a specific -- a special forum, remedy, and cause  
10 of action for this case alone.

11 I welcome the Court's questions.

12 JUSTICE THOMAS: Is there any instance  
13 in which the United States can do what it's  
14 doing now that would be acceptable to you? That  
15 is, that -- let's say there is no question  
16 whatsoever that a state is defying a national  
17 law or a federal law or a constitutional  
18 provision, such as, for example, the Second  
19 Amendment. Is there any instance in which the  
20 United States can step in?

21 MR. STONE: So, Your Honor, I have to  
22 first clarify, are you saying with a cause of  
23 action provided by Congress or only in this In  
24 re Debs self-styled --

25 JUSTICE THOMAS: In re Debs.

1                   MR. STONE: Your Honor, if the -- to  
2 the extent that Congress had provided either a  
3 proprietary right or had recognized a public  
4 harm in the form of a statute, for example, the  
5 Interstate Commerce Act, and then also the  
6 United States was seeking a traditional form of  
7 equitable relief, such as in Debs to evade a  
8 public nuisance, then it could proceed.

9                   JUSTICE THOMAS: So a very narrow set  
10 of cases?

11                   MR. STONE: Yes, Your Honor, but some.

12                   JUSTICE THOMAS: A separate question.  
13 What -- I'm interested in the cases that are  
14 proceeding in state court -- and this is a  
15 carry-over from the first case -- what remedies  
16 could be provided in those cases if they were  
17 allowed to proceed?

18                   MR. STONE: Well, an individual could  
19 -- could receive, for example, an injunction  
20 preventing the -- the bringing of an enforcement  
21 action or by bringing a lawsuit by a plaintiff  
22 who seeks to do so.

23                   Now, of course, as discussed earlier  
24 to Justice Barrett, that would only provide  
25 relief as against that one individual. But the



1 more important part here is that eventually  
2 those sorts of cases would be decided on stare  
3 decisis grounds by appellate courts, which would  
4 prevent follow-on cases to some extent.

5 But, in terms of relief, you get  
6 declarations basically out of the Texas state  
7 system, a declaration that S. -- that an  
8 application of S.B. 8 against an individual -- I  
9 misspoke earlier with an injunction, I'm  
10 sorry -- that a declaration that -- that a -- an  
11 S.B. 8 claim by that individual against the  
12 protected conduct that someone was raising would  
13 violate state law, federal law, whatever the  
14 claim might be.

15 JUSTICE THOMAS: And one final point.  
16 The -- why wouldn't -- and -- and I think I --  
17 you know, I've alluded to this before, I'd asked  
18 this before -- why wouldn't these private  
19 individuals be considered private attorneys  
20 generals? The -- because so much seems to be --  
21 one thing that seems rather implicit on the  
22 other side is that they are in effect, if not in  
23 designation by law, attorneys generals because  
24 they are enforcing a statewide policy.

25 So your argument, again, would be that

1 they are not private attorneys general because,  
2 or they are not acting in concert, they're not  
3 deputized, they're not agents because?

4 MR. STONE: Because they're not  
5 subject to the state's control. They don't have  
6 access to the state's investigatory resources.  
7 The state can't at some point, for example, take  
8 the case over, like in a qui tam action, those  
9 sorts of answers that I was providing earlier,  
10 Justice Thomas.

11 But my answer would run specifically  
12 to the lack of control between the state with  
13 regards to an S.B. 8 private plaintiff suit.

14 JUSTICE BREYER: Let me think of -- of  
15 just a specific example which was the worst one  
16 I could think of for you, the -- the -- I mean,  
17 suppose a governor filed this, you know, had  
18 this model law and said anyone who brings a  
19 black child to a white school is subject to, you  
20 know, and then we copy the law. Here we are.

21 Now, if you were in that situation,  
22 which I'm sure you're glad you're not, what?  
23 What would you do? I mean, if we uphold this,  
24 are we retroactively upholding that?

25 MR. STONE: No, Your Honor. As a

1 matter of fact, for that very specific case,  
2 Congress has specifically provided DOJ --

3 JUSTICE BREYER: Oh. No, no, this is  
4 before Congress -- I mean, '57, Congress was no  
5 help. I mean, believe me, they did nothing, or,  
6 if they did something, I'm unaware of it, and,  
7 if they did something, I assume it out of the  
8 hypothetical.

9 MR. STONE: Fair enough.

10 (Laughter.)

11 MR. STONE: Fair enough, Your Honor.  
12 The answer would be that -- that there would  
13 have to be recourse, again, to the state court.  
14 I'm assuming this is a state legislature because  
15 we're talking about federal court actions.

16 JUSTICE BREYER: This was Arkansas in  
17 1957.

18 MR. STONE: Sure, Your Honor. And --  
19 and that, in fact, that that court would be  
20 obligated to apply this Court's decisions, it's  
21 a transparent violation of the Fourteenth  
22 Amendment, of course, Your Honor. We have to  
23 assume that state court judges take away --

24 JUSTICE BREYER: Yeah, but they  
25 didn't. I mean, we have some experience. And

1 -- and -- and most of those cases that came up  
2 in that period to this Court, the judges were  
3 aware of that experience and they tried to shape  
4 the law to avoid it.

5 So is there anything you can think of?  
6 I'm getting your answer is no, you cannot think  
7 of anything.

8 The only thing we would have to have  
9 said then is -- is, well, it's up to the State  
10 of Arkansas's judges?

11 MR. STONE: The problem, Your Honor,  
12 is that the number one -- the number one answer  
13 to your question is the thing you've asked me to  
14 assume away, which is the thing Congress has  
15 actually done, which is, in 42 U.S.C.  
16 2000(c)(6), specifically provided a cause of  
17 action for the United States --

18 JUSTICE SOTOMAYOR: So can I --

19 MR. STONE: -- to maintain a cause of  
20 action --

21 JUSTICE SOTOMAYOR: -- give you  
22 examples --

23 MR. STONE: -- under the equal  
24 protection clause.

25 JUSTICE SOTOMAYOR: -- can I give you

1 examples where Congress hasn't? Somebody -- a  
2 state dissatisfied with Heller says anyone who  
3 possesses a firearm anywhere is subject to  
4 litigation by any private citizen anywhere in  
5 the country and gets a million dollar bounty.  
6 No stare decisis. No nothing.

7           How about in Obergefell, imposes S.B.  
8 8 style liability on anyone who officiates,  
9 aids, or abets a same sex wedding? How about,  
10 dissatisfied with Lawrence versus Texas,  
11 subjects private consensual sexual conduct of  
12 which it disapproved to the exact same law as  
13 S.B. 8? How about Griswold, the use and sale of  
14 contraception is subject to S.B. 8 style  
15 liability?

16           So this is not limited to abortion.  
17 That's the point that's been raised. It's  
18 limited to any law that a state thinks it's  
19 dissatisfied with.

20           MR. STONE: Your Honor, I have at no  
21 point in the earlier argument or this one  
22 asserted that the extent of federal courts or  
23 federal court availability turns on the  
24 underlying right here. Quite the opposite. I  
25 agree with you it doesn't.

1 JUSTICE SOTOMAYOR: So your point is  
2 that no matter how much a state intends to chill  
3 the exercise of a constitutional right, as the  
4 Chief said, imposing a million dollar liability  
5 for an act which I think almost any sane person  
6 except a couple of billionaires might choose to  
7 resist, that that does not give anyone a right  
8 to a federal forum when the state has deputized  
9 every citizen to act on its behalf?

10 MR. STONE: No, Your Honor, it does  
11 not create federal jurisdiction as a  
12 consequence.

13 I -- I do want, however, in the spirit  
14 of the hypotheticals you're delivering, want to  
15 return to a point that Justice Barris made --  
16 Barrett made at the end of my friend's previous  
17 argument.

18 At a very minimum, to the extent that  
19 this Court believes it has to somehow alter the  
20 Ex parte Young fiction or et cetera to find a  
21 way to allow the plaintiffs in Whole Woman's  
22 Health to proceed, at a minimum, the United  
23 States' case must thereby fail.

24 The United States just conceded up  
25 here that -- that whatever interest they had

1 would be purely retrospective as of there being  
2 some sort of ability to vindicate the -- the  
3 rights that Whole Woman's Health and other  
4 petitioners are trying to provide.

5 They only seek a preliminary  
6 injunction, which is by definition exclusively  
7 prospective relief, and they cannot possibly  
8 maintain their action any further. It goes  
9 exactly one way.

10 If Whole -- if the petitioners in  
11 Whole Woman's Health have some sort of avenue of  
12 relief, then the United States must not, which  
13 makes sense given for the extraordinary cause of  
14 action that they're trying to bring here.

15 Congress has provided the United  
16 States certainly at times sometimes with truly  
17 extraordinary powers, such as the power of  
18 preclearance, you know, under the Voting Rights  
19 Act to give one extraordinary example.

20 The United States here would want  
21 effectively a follow-on injunction for, in their  
22 words, in the event that the State of Texas  
23 changed its law or otherwise tried to, in a way  
24 of uncharitably putting it, if the State of  
25 Texas changed its law to comply with this case

1 -- this state -- with this Court's law and yet,  
2 nonetheless, have something like S.B. 8.

3           We have a term for when a state is put  
4 into a state where they have to get the federal  
5 government's approval before it makes a relevant  
6 legal change, and that's called preclearance.  
7 It's precisely the kind of injunction my friend  
8 on the other side was speaking of.

9           So it can't possibly be the case  
10 they'd be entitled to that sort of remedy just  
11 as a matter of course in the event that Whole  
12 Woman's Health succeeds or prevails to any  
13 extent.

14           That's just one component of the  
15 extraordinary expansion -- I'm sorry, I thought  
16 you were -- sorry, Justice Kavanaugh, I thought  
17 you were asking a question -- just one component  
18 of the extraordinary expansion of federal power  
19 that the United States is asking for here.

20           Not only are they claiming a brand new  
21 sovereign interest, which can be synthesized one  
22 of two ways, either in ensuring the vindication  
23 of individual rights underneath this Court's --  
24 underneath this Court's pronouncements in Casey  
25 in substantive due process, or, apparently, a



1 sovereign right to ensure the expansion of  
2 access to the federal courts because, after all,  
3 Section 1983 and Congress's various statutes  
4 that compose the federal courts, they stand as  
5 they stand. Texas understands them, as does  
6 this Court. They stand for what they are. The  
7 United States can't possibly have a sovereign  
8 interest in extending the application of those  
9 doctrines to apply to cases to which they don't  
10 just because they deem this a very important  
11 case.

12 JUSTICE KAGAN: General, if -- if I  
13 understand your answer to Justice Sotomayor, it  
14 was, well, even if that's a really good question  
15 that I don't have an answer to in the other  
16 case, I do have an answer to it in this case.

17 And that's fine. That's -- you know,  
18 here you are. We're in this case now. But I  
19 guess I just would like to take you back to the  
20 other case and to ask you to answer the question  
21 that you said you wanted to avoid for Justice  
22 Sotomayor.

23 MR. STONE: I'm sorry, Your Honor. I  
24 thought I -- I thought I'd agreed that it  
25 doesn't depend on -- that it doesn't depend on

1 the nature of the right being asserted and that  
2 also none of the -- we could sort of raise the  
3 potential sanction as high as possible and that  
4 wouldn't -- and that wouldn't affect federal  
5 court availability. I'm sorry, I thought I'd  
6 answered that, but to make my answer --

7 JUSTICE KAGAN: Okay. Thank you.

8 MR. STONE: -- expressly clear.

9 JUSTICE KAGAN: Okay.

10 MR. STONE: The other dimension in  
11 which the United States is -- is asking for an  
12 extraordinary power is the nature of the remedy  
13 they're seeking.

14 JUSTICE KAGAN: I guess I -- I do want  
15 to ask a question about that, though.

16 (Laughter.)

17 JUSTICE KAGAN: I mean, if that's  
18 right, you know, and we say that, we would live  
19 in a very different world from the world we live  
20 in today. Essentially, we would be inviting  
21 states, all 50 of them, with respect to their  
22 un-preferred constitutional rights, to try to  
23 nullify the law of -- that this Court has laid  
24 down as to the content of those rights.

25 I mean, that was something that until

1 this law came along no state dreamed of doing.  
2 And, essentially, we would be like, you know,  
3 we're open for business -- you're open for  
4 business. There's -- there's -- there's --  
5 there's nothing the Supreme Court can do about  
6 it. Guns, same sex marriage, religious rights,  
7 whatever you don't like, go ahead.

8 MR. STONE: Respectfully, Your Honor,  
9 I have to disagree with you on two points, the  
10 first one being the State of Texas hasn't  
11 nullified anything. The State of Texas  
12 specifically set up in state law a recognition  
13 of this Court's holdings in Casey, providing an  
14 undue burden defense, particularly to recognize  
15 that this Court's holdings bind state courts in  
16 their adjudication. And, of course, the federal  
17 constitutional right can and must be made  
18 available in those state courts regardless.

19 The second point being to the extent  
20 that we're talking about sort of the extremis  
21 hypothetical where it's a \$5 billion sanction,  
22 and, by the way, court is on the moon --

23 JUSTICE KAGAN: By the way, this seems  
24 a pretty extremis hypothetical actual, you know,  
25 I mean, because the actual provisions in this

1 law have prevented every woman in Texas from  
2 exercising a constitutional right as declared by  
3 this Court.

4 MR. STONE: That -- that's just --

5 JUSTICE KAGAN: That's not a  
6 hypothetical. That's an actual.

7 MR. STONE: That's just not true, Your  
8 Honor. There's evidence in the record that  
9 estimates that the number of abortions occurring  
10 right now in Texas is between 50 and 63 percent  
11 --

12 JUSTICE KAGAN: I'm sorry. You're  
13 exactly right. I should have said every woman  
14 in Texas who has not learned and has not made a  
15 decision before six weeks.

16 MR. STONE: Respectfully, Your Honor,  
17 there's a big difference between asserting that  
18 a state has structured its courts to defy  
19 federal law to completely extinguish a right and  
20 saying that a state has codified specifically  
21 this Court's holdings in the applicable case and  
22 then also to that extent the deterrent effect  
23 has caused some diminution of the exercise of  
24 that right. That's a very substantial  
25 difference and it's certainly a substantial

1 difference for purposes of the judges of the  
2 courts of the State of Texas.

3 So, again, just -- just, if I may, to  
4 go back to the extraordinary nature of the kind  
5 of remedy that the federal government is seeking  
6 in this instance --

7 JUSTICE KAVANAUGH: Just on the  
8 question of -- of the kind of law, H.B. 1280,  
9 which was passed around the same time as I  
10 understand it, which is the law that -- the  
11 trigger law, so to speak, that has ordinary  
12 enforcement mechanisms, as I understand it,  
13 criminal sanctions enforced by the state, civil.  
14 And if you pair that with this law, it looks  
15 like this law was designed to avoid the review  
16 that that law kind of openly would be available  
17 under our --

18 MR. STONE: No doubt, Texas, just like  
19 every other state when passing its laws, is well  
20 aware of the limits of federal jurisdiction in  
21 federal courts. And, no doubt, Texas crafted  
22 its law in part because it wanted to avoid  
23 federal pre-enforcement challenges, as opposed  
24 to having those challenges in state court. It's  
25 -- I agree that's an obvious purpose of this law

1 or one of the obvious ways that this law  
2 functions.

3 That having been said, Texas doesn't  
4 commit a constitutional wrong by channeling its  
5 state court challenges into state court. That  
6 is not an independent Texas -- that's not an  
7 independent constitutional obligation that Texas  
8 is under. It's not -- it doesn't have to sort  
9 of fly blind as far as -- as far as the  
10 collateral effects of what kinds of challenges  
11 it will receive when it decides how to structure  
12 a law.

13 JUSTICE SOTOMAYOR: But it does have  
14 an obligation to follow, to respect people's  
15 federal constitutional rights?

16 MR. STONE: Absolutely, Your Honor.  
17 And, again --

18 JUSTICE SOTOMAYOR: So, if it's  
19 attempting to stifle those rights, chill their  
20 exercise, and keep plaintiffs away from a 1983  
21 action and Ex parte Young liability, you say  
22 there's nothing wrong with that?

23 MR. STONE: Your Honor, the limits of  
24 19 -- Section 1983 and Ex parte Young's  
25 availability, specifically 1983, though,

1 Congress could extend Ex parte Young, are a  
2 matter of Congress. The idea that Texas would  
3 design a tort statute or design a form of  
4 liability that takes that in mind and then says  
5 these claims have to go through the state tort  
6 system, the state court system, Texas judges are  
7 presumed by this Court and by, for that matter,  
8 appellate judges in Texas to follow this Court's  
9 precedents fully and faithfully.

10 Texas does not suppress any  
11 substantive right by saying that it wants --  
12 that it prefers to see certain kinds of  
13 challenges brought through the state court  
14 system.

15 JUSTICE KAVANAUGH: But the -- but the  
16 -- the --

17 MR. STONE: And to the extent that it  
18 -- that one or more Texas state court judges  
19 fail to fully apply and faithfully apply this  
20 Court's precedents regarding Casey or any other  
21 constitutional right, this Court is and always  
22 is the supreme arbiter of properly presented --

23 JUSTICE KAVANAUGH: But the problem  
24 they --

25 MR. STONE: -- questions of federal

1 law.

2 JUSTICE KAVANAUGH: -- the problem  
3 they raise -- and I'll just have you answer it  
4 -- is they say this law is designed to avoid all  
5 judicial review because the penalties that are  
6 imposed for a violation are so substantial, and  
7 then you combine that with the retroactivity  
8 provision, that people aren't going to be  
9 willing to engage in activity that's prohibited  
10 by this law.

11 So there will be no federal court  
12 review up front, no state court review on the  
13 back end, which is the exact -- exact Ex parte  
14 Young situation, you know, put aside the named  
15 party, but that's the exact situation. Can --  
16 can you respond to that?

17 MR. STONE: Of course, Your Honor.  
18 Two points, the first one being that the -- the  
19 procedural mechanisms, the attorney's  
20 fees-shifting provision and the preferential  
21 venue provision, to the extent that those things  
22 would be sufficient to effectively deny someone  
23 access to the courts standing on their own, then  
24 there are an awful lot of statutes and tort  
25 actions that deny access to the courts on their



1 own.

2 I mean, another complaint of my  
3 friends on the other side in Whole Woman's  
4 Health was regarding the lack of non-mutual  
5 collateral estoppel. Well, this Court has held  
6 that there are certain applications of  
7 non-mutual collateral estoppel that violate due  
8 process. It's never been a violation of due  
9 process to not import that doctrine into a  
10 state's adjudication system.

11 So I think what we're left with here  
12 is the \$10,000 -- the \$10,000 potential damages  
13 award or actual damages that's doing the --  
14 that's doing the chilling. And to the extent  
15 that we're talking --

16 JUSTICE KAGAN: But, General Stone, I  
17 think it's the combination of everything, you  
18 know? It's the \$10,000 and it's everything that  
19 Justice Kavanaugh said and it's other provisions  
20 behind. And we've had a little experiment here,  
21 and we've seen what the chilling effect is.

22 You know, usually, in these chilling  
23 effect cases, we're kind of guessing. Well, I  
24 -- this would sort of chill me. But, here,  
25 we're not guessing. We know exactly what has

1 happened as a result of this law. It has  
2 chilled everybody on the ground.

3 MR. STONE: Your Honor, to the extent  
4 that we're talking about whether one or more of  
5 these procedural mechanisms might itself end up  
6 being a burden in the undue -- in the undue  
7 burden sense, an individual -- may I?

8 CHIEF JUSTICE ROBERTS: Please finish  
9 your answer.

10 MR. STONE: Thank you. An individual  
11 could itself -- could themselves raise one of  
12 these procedural mechanisms or compliance with  
13 them in the state court action and say this  
14 particular fees provision defending this action  
15 actually is an undue burden on me because it  
16 prevents me from raising my undue burden right  
17 itself, or perhaps, for example, a petition  
18 clause or due process clause, there might be  
19 other constitutional clauses that would protect  
20 an individual who's placed into a situation  
21 where the rules of a court itself prevent them  
22 from exercising an undue burden right, but still  
23 wouldn't -- what that wouldn't get you is access  
24 to pre-enforcement federal review of the  
25 substantive due process right that an action --

1 an action under S.B. 8 may or may not implicate.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 counsel.

4 Justice Thomas, anything further?

5 JUSTICE THOMAS: No, Chief.

6 CHIEF JUSTICE ROBERTS: Justice  
7 Breyer?

8 Justice Alito?

9 JUSTICE ALITO: If some abortions have  
10 been chilled, is there any way to determine the  
11 degree to which that is the result of the  
12 potential for S.B. 8 suits from the degree to  
13 which it is attributable to the fear of  
14 liability if Roe or Casey is altered?

15 MR. STONE: I don't think there's a  
16 way of being able to disaggregate those, Justice  
17 Alito. And, undoubtedly, individuals engaging  
18 in protected conduct that believe the protection  
19 might be removed or reasonably believe that,  
20 undoubtedly, there's an extra kind of chill.  
21 They feel that's not attributable to the state  
22 or to anyone else for that matter.

23 JUSTICE ALITO: Would the issuance of  
24 the injunction sought by the United States have  
25 any effect on liability for abortions performed

1 after the effective date of this act?

2 MR. STONE: So it would prevent -- it  
3 wouldn't have prevention of liability. It might  
4 stop anyone from filing a lawsuit. But, of  
5 course, an injunction preventing someone from  
6 filing a lawsuit doesn't prevent a state law  
7 from being effective in the event they could  
8 file in another forum or in some way they're not  
9 covered by the injunction, Your Honor.

10 JUSTICE ALITO: Well, if the  
11 injunction were entered and abortions were  
12 performed, would that immunize the abortion  
13 providers subsequently from liability?

14 MR. STONE: No, Your Honor, all that  
15 would do is -- would be preventing the  
16 individuals who had notice of the injunction --  
17 first, they'd have to have an opportunity to  
18 respond before they were enjoined, but let's  
19 skip over all of those injunctive problems.  
20 They'd -- those individuals would merely not be  
21 able to bring S.B. 8 suits. It wouldn't somehow  
22 dissolve in the abstract liability under S.B. 8  
23 for performing the abortions.

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

2 JUSTICE SOTOMAYOR: Nothing.

3 CHIEF JUSTICE ROBERTS: Justice Kagan?

4 Justice Gorsuch?

5 Justice Kavanaugh?

6 JUSTICE KAVANAUGH: Can I just get  
7 more clarity about how you think that  
8 retroactivity provision works? Are you saying  
9 that if an injunction were entered and someone  
10 -- some clinic performed abortions now that were  
11 then legal under current law, but the law  
12 changes in the future such that the state could,  
13 going forward, restrict abortions at an earlier  
14 time, are you saying that the state could then  
15 reach back and retroactively -- or allow suits  
16 that would reach back and retroactively impose  
17 liability on entities that were committing  
18 lawful acts as of the time?

19 MR. STONE: It would be private  
20 plaintiffs, again, Your Honor, but -- but, of  
21 course --

22 JUSTICE KAVANAUGH: Is that a yes?

23 MR. STONE: Yes, Your Honor. Yes.

24 JUSTICE KAVANAUGH: And is there any  
25 limit on that retroactive liability?

1           MR. STONE: There might be. Again,  
2 I'd have to hypothesize, perhaps a due process  
3 claim if it were -- in some extreme  
4 circumstance. But, no, there's nothing on the  
5 face of S.B. 8 that would provide it.

6           JUSTICE KAVANAUGH: Does that play  
7 into the chilling effect argument that was being  
8 raised that, presumably, one of the concerns is  
9 even though you would challenge it today and  
10 think -- you would engage in the activity today  
11 because you would be confident, you're chilled  
12 by the prospect of future changes and then  
13 someone reaching back and imposing millions and  
14 millions of dollars of -- right?

15          MR. STONE: Perhaps so, Your Honor,  
16 but I think that's a --

17          JUSTICE KAVANAUGH: Almost certainly  
18 so, right? Millions and millions retroactively  
19 imposed --

20          MR. STONE: Undoubtedly.

21          JUSTICE KAVANAUGH: -- even though the  
22 activity was perfectly lawful under all court  
23 orders and precedent at the time it was  
24 undertaken, right?

25          MR. STONE: Undoubtedly, Your Honor.

1 JUSTICE KAVANAUGH: Okay.

2 CHIEF JUSTICE ROBERTS: Justice  
3 Barrett?

4 JUSTICE BARRETT: I just have one  
5 question. So we were talking about  
6 pre-enforcement review and the chilling effect.  
7 So, if not available -- your position is it's  
8 not available in federal court, and you pointed  
9 out when you were talking to me before in the  
10 last case that in state court, it's not  
11 available in the Ex parte Young sense, in which  
12 you could obtain an injunction that would  
13 altogether protect you from enforcement  
14 activity, but you could on a case-by-case basis  
15 obtain an injunction against individual  
16 plaintiffs. You pointed out that that might  
17 ultimately give you more protection because it  
18 would go up the chain and there would be stare  
19 decisis effect.

20 What if, in addition to the other  
21 procedural obstacles that the law contains here,  
22 the legislature also added a provision saying  
23 there would be no stare decisis effect of any  
24 decision reached by the Texas Supreme Court?

25 MR. STONE: Then, Your Honor, I would

1     assume it would make it even more imperative for  
2     one of those cases to be taken up by this Court  
3     to resolve any questions that were -- that were  
4     presented there. But that would mean that would  
5     be the only final way that you could have  
6     binding stare -- stare decisis effect.

7                     JUSTICE BARRETT: Thank you.

8                     CHIEF JUSTICE ROBERTS: Thank you,  
9     counsel.

10                    Mr. Mitchell.

11                    ORAL ARGUMENT OF JONATHAN F. MITCHELL

12                    ON BEHALF OF THE PRIVATE RESPONDENTS

13                    MR. MITCHELL: Mr. Chief Justice, and  
14     may it please the Court:

15                    The intervenors intend to sue those  
16     who violate Senate Bill 8 but only in response  
17     to conduct that falls outside the protections of  
18     Roe and Casey. The United States cannot seek or  
19     obtain relief that thwarts the enforcement of  
20     S.B. 8 in those situations. The statute  
21     contains emphatic severability and saving  
22     construction requirements, and courts are  
23     obligated to preserve the constitutional  
24     applications of statutes to the maximum possible  
25     extent.



1           The United States also cannot seek or  
2 obtain relief that would prevent private  
3 individuals from suing under S.B. 8 because any  
4 such relief would be a flagrant violation of the  
5 due process clause. A federal court cannot ban  
6 private individuals from petitioning the courts  
7 in a case to which they have not been made a  
8 party. And a federal court cannot foreclose  
9 those individuals from suing under S.B. 8 when  
10 they have been given no opportunity to defend  
11 the merits of the lawsuit that they intend to  
12 bring.

13           I welcome the Court's questions.

14           CHIEF JUSTICE ROBERTS: I guess one  
15 would be you -- you've heard the exchanges with  
16 General Prelogar about the breadth of the  
17 asserted federal right.

18           MR. MITCHELL: Yes.

19           CHIEF JUSTICE ROBERTS: And she  
20 offered some answers to those questions about  
21 the limited nature, and I wanted to get your  
22 reaction to that.

23           MR. MITCHELL: Yes. And, Chief  
24 Justice Roberts, as I understand the United  
25 States' argument as they've spelled it out on

1 pages 10 and 20 of their brief, the -- the  
2 asserted sovereign interest that they're making  
3 under In re Debs depends entirely on the  
4 existence of a congressional enactment,  
5 Section 1983, that does not go far enough in the  
6 views of the United States.

7 What they're saying with respect to  
8 their sovereign interest is that Texas is  
9 thwarting Section 1983 and Ex parte Young by  
10 enacting a statute that is not subject to  
11 pre-enforcement challenge under either of those  
12 sources of law.

13 That to us is not in any way a  
14 sovereign interest under Debs. That's a  
15 grievance with Congress, that Congress enacted a  
16 law, but Congress's law doesn't go far enough  
17 for the United States because Texas has found a  
18 gap in this congressionally created remedial  
19 scheme that allows its law to escape  
20 pre-enforcement judicial review.

21 The proper response in that situation  
22 is to go to Congress and ask Congress to amend  
23 the remedies that they have set forth, either by  
24 abrogating state sovereign immunity or perhaps  
25 by enacting the Women's Health Protection Act,

1 which would preempt S.B. 8 and also abrogate  
2 state immunity and give the attorney general the  
3 explicit cause of action. But in no way can  
4 equity be invoked to patch up the holes or the  
5 perceived holes in a statute that Congress has  
6 enacted.

7           The second issue with respect to the  
8 sovereign interests that the United States  
9 asserts surrounds *Ex parte Young* because they  
10 claim in their brief that *Ex parte Young* does  
11 not go far enough in authorizing a  
12 pre-enforcement challenge.

13           And that too runs into the problem of  
14 *Grupo Mexicano*. There is clearly a traditional  
15 cause of action in equity for an individual to  
16 sue an individual officer that is violating his  
17 federally protected rights, but there is no  
18 traditional cause of action or remedy in equity  
19 that would ever allow a court to enjoin the  
20 state judiciary from even hearing a case that  
21 has yet to be filed.

22           And *Ex parte Young* explicitly  
23 disclaims any such remedy on page 163 when it  
24 says that an injunction against a state court  
25 would be a violation of our whole scheme of

1 government. So what the --

2 CHIEF JUSTICE ROBERTS: Well, but, at  
3 the same time, subsequent cases suggest that  
4 that language can't be read as broadly as you  
5 suggest, Shelley against Kraemer, Terry against  
6 Adams, some of the others where they've  
7 recognized that courts can be viewed as part of  
8 a mechanism of enforcing particular rights.

9 MR. MITCHELL: That's true, but in  
10 neither of these cases that Your Honor cited was  
11 there an injunction directed at the state  
12 judiciary itself. And under Grupo Mexicano,  
13 equitable remedies must be limited to those that  
14 were traditionally available in equity. And Ex  
15 parte Young makes clear that a remedy that would  
16 enjoin or restrain a state court or a state  
17 judge from even considering a case is not a  
18 remedy that was traditionally available in  
19 equity.

20 So it's impossible to escape the  
21 conclusion that this relief requested by the  
22 United States is barred --

23 CHIEF JUSTICE ROBERTS: Well, I mean  
24 --

25 MR. MITCHELL: -- by Grupo Mexicano.

1 CHIEF JUSTICE ROBERTS: Well, Grupo  
2 Mexicano is notoriously cryptic. And -- but  
3 Shelley against Kraemer, Terry against Adams,  
4 they aren't really -- I mean, if you look at  
5 Justice Frankfurter's opinion in -- in Terry, he  
6 says, you know, somewhere, somehow, to some  
7 extent, you have to have some participation.  
8 That seems like a pretty flexible standard.

9 MR. MITCHELL: Well, again, in Terry  
10 against Adams, their cause of action was  
11 undisputed. The existence of an Article III  
12 case or controversy was undisputed. And those  
13 are the two obstacles here that the United  
14 States must confront.

15 So the fact that there is case law out  
16 there in which relief has been granted in  
17 similar situations involving situations where  
18 there was no question of the existence of an  
19 Article III case or controversy and no question  
20 of the existence of a cause of action does not  
21 give any leverage to the United States' argument  
22 here, when the very objection we're making is  
23 that they can't bring suit because there's no  
24 Article III case or controversy under Muskrat  
25 and, on top of that, they can't bring suit

1 because there's no cause of action in equity  
2 because the relief they seek is not relief that  
3 is traditionally available.

4 CHIEF JUSTICE ROBERTS: Well, there is  
5 an Article III case or controversy with respect  
6 to the clerks, right? It's a direct adversity.  
7 The clerks want to file the action, and the  
8 plaintiffs don't want them to.

9 MR. MITCHELL: True. But the clerks  
10 aren't the named defendants in this lawsuit;  
11 only the State of Texas is. And under Muskrat,  
12 you cannot sue the sovereign entity when your  
13 complaint is that the sovereign is allowing its  
14 courts to adjudicate cases under a statute that  
15 you believe to be unconstitutional. It would be  
16 no different from the abortion providers suing  
17 the United States Government because they're  
18 allowing S.B. 8 enforcement lawsuits to be heard  
19 under the diversity jurisdiction.

20 There wouldn't be a case or  
21 controversy with the United States simply  
22 because it's opening its courtroom doors to  
23 these claims. What they would have to do is  
24 wait for the cases to be filed and then assert  
25 their constitutional challenges to the statute

1 in that litigation between the private citizens.

2 JUSTICE KAVANAUGH: Do you agree, to  
3 follow up on the Chief Justice's questions, that  
4 state clerks, court clerks, and state judges  
5 enforce state law when they entertain private  
6 civil suits?

7 MR. MITCHELL: No, I don't believe  
8 they can be said to be enforcing state law in  
9 those situations --

10 JUSTICE KAVANAUGH: Then how do you  
11 deal with all the language in Shelley versus  
12 Kraemer that says -- that uses the word  
13 "enforce"?

14 MR. MITCHELL: Because I think in that  
15 context enforcement is coming after a judgment  
16 has been entered by the court and then the  
17 judgment is being enforced.

18 But simply adjudicating a case at the  
19 outset and simply docketing a complaint, that is  
20 not enforcement.

21 And this goes to another problem with  
22 the remedy that the United States is seeking  
23 with respect to the private individuals. They  
24 are asking the Court to restrain Texas from  
25 adjudicating lawsuits. They want to stop the

1 clerks from docketing the complaints. They want  
2 to stop the judges from hearing or presiding  
3 over the cases.

4           And then they say that injunction  
5 should extend to private individuals under Rule  
6 65(d)(2)(C). The problem is the private  
7 individuals aren't doing any of those things  
8 that the state has been enjoined from doing.  
9 They're doing something entirely different.  
10 They're the ones who are filing the lawsuits.  
11 And the state can't file the lawsuit because  
12 it's not allowed to file it under the statute.

13           And it, therefore, can't be enjoined  
14 from doing so because an injunction against the  
15 state that tells it not to file a lawsuit is  
16 enjoining the state from doing something that it  
17 never would have done in the first place.

18           So there's another major problem with  
19 trying to get private individuals covered by  
20 this injunction that the district court laid  
21 out. The only conduct the private individuals  
22 are engaged in is conduct that the State of  
23 Texas is not.

24           JUSTICE SOTOMAYOR: Counsel, a state  
25 is an idealized entity. The whole fiction of Ex



1 parte Young had to be created because a state  
2 qua state can't act. It can only designate  
3 people to act for it.

4 And so, if the state is designating  
5 whether its ordinary citizens or the attorney  
6 general or its attorney -- district attorneys,  
7 if it's designating those people to act for it,  
8 why aren't those people bound by any judgment  
9 that says, state, what you're doing is  
10 unconstitutional?

11 MR. MITCHELL: They -- they wouldn't  
12 --

13 JUSTICE SOTOMAYOR: And no agent of  
14 yours can enforce this law, whether it's  
15 ordinary citizens, the attorney general, state  
16 licensing officials, clerks of court, or, as  
17 Shelley recognized, a court system that would  
18 enforce a restricted covenant demanding  
19 segregation? Why aren't we in exactly that same  
20 position?

21 MR. MITCHELL: They would be bound if  
22 they can satisfy the test of Rule 65(d)(2)(C),  
23 which says they have to be acting in active  
24 concert --

25 JUSTICE SOTOMAYOR: Why? They are.

1 MR. MITCHELL: No.

2 JUSTICE SOTOMAYOR: Each of them is  
3 acting under the directives of the state law.  
4 So why aren't they acting like the state when  
5 they act?

6 MR. MITCHELL: No, Justice Sotomayor,  
7 I -- I respectfully disagree with that  
8 characterization.

9 JUSTICE SOTOMAYOR: The --

10 MR. MITCHELL: The state --

11 JUSTICE SOTOMAYOR: I know you  
12 disagree.

13 MR. MITCHELL: Well, I'm --

14 JUSTICE SOTOMAYOR: But I'm trying to  
15 get you --

16 MR. MITCHELL: -- I'm going to explain  
17 why I disagree with it.

18 JUSTICE SOTOMAYOR: Go ahead.

19 MR. MITCHELL: The state is not in any  
20 way directing the activity -- may I answer?

21 CHIEF JUSTICE ROBERTS: Please.

22 MR. MITCHELL: The state is not  
23 directing the activity of these private  
24 individuals. The state has passed a law that  
25 gives them the option to sue and then it has

1 washed its hands of the matter. So there is no  
2 joint participation with the state in their --

3 JUSTICE SOTOMAYOR: How is --

4 MR. MITCHELL: -- decision.

5 JUSTICE SOTOMAYOR: -- that any  
6 different than there being state action when a  
7 prosecutor exercises a discriminatory Batson  
8 challenge?

9 MR. MITCHELL: May I?

10 JUSTICE SOTOMAYOR: Or how is there  
11 state action when state primary actors exclude  
12 races or exclude people from primaries, and  
13 we've called that state action, even though the  
14 state has just given them the authority to act  
15 with no control over what they're going to do?

16 MR. MITCHELL: Right. So --

17 JUSTICE SOTOMAYOR: So we have  
18 recognized that people -- that washing your  
19 hands doesn't insulate a state.

20 MR. MITCHELL: With -- with your  
21 example on the --

22 JUSTICE SOTOMAYOR: Or insulate people  
23 from acting on behalf of the state.

24 MR. MITCHELL: Yes. The prosecutor in  
25 your hypothetical is an employee of the state.

1 He's part of a state government. He's part of  
2 the machinery of the state. The white primary  
3 example is a more difficult question because  
4 they were formerly established as a private  
5 entity, and --

6 JUSTICE SOTOMAYOR: Are you suggesting  
7 that states can hire agents to do  
8 unconstitutional acts?

9 MR. MITCHELL: No, they cannot hire  
10 agents --

11 JUSTICE SOTOMAYOR: So what's --

12 MR. MITCHELL: -- no.

13 JUSTICE SOTOMAYOR: -- how can the  
14 state designate a private individual --

15 MR. MITCHELL: Because these --

16 JUSTICE SOTOMAYOR: -- to act on its  
17 -- under its laws to violate a person's  
18 constitutional right?

19 MR. MITCHELL: There's not an agency  
20 relationship here, Justice Sotomayor. These --

21 JUSTICE SOTOMAYOR: It's -- it's  
22 saying to it you, under this law, our law, you  
23 can act.

24 MR. MITCHELL: I see my time has long  
25 expired. May -- may I continue to answer or --

1 CHIEF JUSTICE ROBERTS: Briefly in the  
2 rule.

3 MR. MITCHELL: Yes, I'm sorry.

4 Justice Sotomayor, if there were an  
5 agency relationship, then Your Honor would be  
6 correct, they would be bound by an injunction  
7 under the principles of Rule 65.

8 But there's no agency relationship  
9 here because the state is statutorily forbidden  
10 to enforce the law or have any enforcement role  
11 whatsoever.

12 That role is given to private  
13 citizens. The state can't have any involvement.  
14 So there can't be joint conduct with the state  
15 with respect to that particular activity.

16 CHIEF JUSTICE ROBERTS: Thank you.

17 Justice Thomas?

18 JUSTICE THOMAS: Nothing, Chief.

19 CHIEF JUSTICE ROBERTS: Justice  
20 Breyer?

21 Justice Alito?

22 Justice Sotomayor?

23 Justice Kagan?

24 Justice Gorsuch?

25 Justice Barrett?

1           Okay. Thank you, counsel.

2           MR. MITCHELL: Thank you, Your Honors.

3           CHIEF JUSTICE ROBERTS: Rebuttal?

4           REBUTTAL ARGUMENT OF ELIZABETH B.

5           PRELOGAR ON BEHALF OF THE PETITIONER

6           GENERAL PRELOGAR: Thank you, Mr.

7 Chief Justice.

8           I'd like to just make three points in  
9 rebuttal, and I'd like to begin with the point  
10 that I understood General Stone to be making  
11 that if this Court ultimately concludes in Whole  
12 Woman's Health that the providers can sue, that  
13 the authority we're claiming here to sue as well  
14 is extraordinary or unprecedented.

15           And I think it is important to  
16 recognize that when the United States of America  
17 filed this suit to try to redress the harm to  
18 the supremacy of federal law in Texas, the Whole  
19 Woman's Health providers had not been able to  
20 obtain any effective redress from the courts.

21           The law had been permitted to take  
22 effect and it had immediately had its intended  
23 operation of chilling the exercise of  
24 constitutionally protected conduct altogether so  
25 that abortions that are protected under Roe and

1 Casey after six weeks of pregnancy could not  
2 occur at all. And I think that that shows the  
3 threat to the supremacy that comes from this  
4 attempted design of a law to block access to the  
5 judiciary.

6           It may well be and I hope that this  
7 Court holds in Whole Woman's Health that the  
8 providers can move forward, but that hasn't  
9 stopped the harm to the sovereign interests of  
10 the United States in the meantime, as Texas has  
11 succeeded, while these novel issues worked their  
12 way through the courts, in blocking access to  
13 care that is protected under this Court's  
14 precedents.

15           And that leads me to my second point,  
16 which is to emphasize the nature of the  
17 sovereign interest here. It is in preventing a  
18 state from being able to act in direct defiance  
19 of this Court's precedents and block access to  
20 the judicial review that Congress and this Court  
21 have deemed necessary to vindicate federal  
22 rights and to further make the state court  
23 mechanism that might provide some alternative  
24 basis for raising those constitutional claims  
25 wholly ineffective and unavailable.

1           The final point is to just step back  
2 for a moment and -- and think about the  
3 startling implications of Texas's argument here.

4           Across the arguments this morning,  
5 Texas's position is that no one can sue, not the  
6 women whose rights are most directly affected,  
7 not the providers who have been chilled in being  
8 able to provide those women with care, and not  
9 the United States in this suit. They say that  
10 federal courts just have no authority under  
11 existing law to provide any mechanism to redress  
12 that harm.

13           And if that is true, if a state can  
14 just take this simple mechanism of taking its  
15 enforcement authority and giving it to the  
16 general public backed up with a bounty of  
17 \$10,000 or \$1 million, if they can do that, then  
18 no constitutional right is safe. No  
19 constitutional decision from this Court is safe.

20           That would be an intolerable state of  
21 affairs and it cannot be the law. Our  
22 constitutional guarantees cannot be that  
23 fragile, and the supremacy of federal law cannot  
24 be that easily subject to manipulation.

25           So we would ask this Court to hold



1 that the United States can proceed with this  
2 action and affirm the preliminary injunction  
3 entered by the district court and immediately  
4 vacate the stay that the Fifth Circuit entered  
5 in this case so that Texas cannot continue to  
6 deny women in its borders a right protected by  
7 this Court's precedents one day longer.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 counsel. The case is submitted.

10 (Whereupon, at 12:55 p.m., the case  
11 was submitted.)

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## Official - Subject to Final Review

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