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IN THE SUPREME COURT OF THE UNITED STATES

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 UNITED STATES,)
 Petitioner,)
 v.) No. 21-588
 TEXAS, ET AL.,) (21A85)
 Respondents.)
 - - - - -

Washington, D.C.

Monday, November 1, 2021

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

APPEARANCES:

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

JUDD E. STONE, II, Solicitor General, Austin, Texas;
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JONATHAN F. MITCHELL, ESQUIRE, Austin, Texas; on
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 the state has structured this scheme in a
21 deliberate attempt to prevent federal courts
22 from doing anything about the constitutional
23 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.

9 A lot of your brief and all the other
10 briefs that have been -- that have been filed
11 against Texas in both of these cases suggest
12 that we should issue a rule that applies just to
13 this case.

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

18 And if you look at the particulars of
19 the enforcement mechanisms, they are
20 unprecedented and they provide cause for
21 concern.

22 And so I -- I'd really like to hear
23 your explanation about why they're appropriate
24 and how they can be limited to this case.

25 Start with the judges. It's

1 unprecedented and it is contrary to our system
2 of federalism to enjoin a state judge even from
3 hearing a case. When has that been done and how
4 can that be justified?

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

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

17 JUSTICE ALITO: Well, Texas is an
18 abstract entity, and any -- an injunction has to
19 apply to people. Yes, there are instances where
20 a state has been enjoined, and what that means
21 is that everybody under the control of, let's
22 say, the state who has -- everybody who has to
23 follow what the state attorney general says has
24 to comply. And the state can pick -- you know,
25 can -- can work out the -- the -- the -- the way

1 that would work. But that doesn't apply to
2 state court judges.

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

9 JUSTICE ALITO: Well, judges have been
10 enjoined --

11 GENERAL PRELOGAR: -- and the reason
12 for that is --

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

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

24 Would the district judge in this case
25 have the authority to enjoin another district

1 judge from even hearing that case?

2 GENERAL PRELOGAR: No, I don't think
3 that the injunction could properly reach the
4 federal system. I -- I don't think that there
5 is any realistic possibility that any of these
6 suits could possibly proceed in federal court
7 because the distinct feature of S.B. 8 is that
8 the plaintiffs who are authorized to sue need
9 not have any injury or suffer any harm from the
10 prohibited abortions.

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

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

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

1 answer?

2 GENERAL PRELOGAR: That -- that is not
3 what I mean to suggest. Here, the injunction
4 runs against Texas, and the state court judges
5 in Texas are being utilized by Texas to
6 effectively create an apparatus that is so
7 lopsided, so procedurally anomalous, and so
8 hostile to constitutionally protected conduct
9 that the mere existence of the suits, no matter
10 how the judges adjudicate them, create the
11 constitutional harm by chilling the conduct.

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

19 JUSTICE GORSUCH: So -- so --

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

23 JUSTICE GORSUCH: General, to -- to
24 achieve this injunction against state courts, do
25 we also have to overrule Ex parte Young, where

1 we said -- and I'll just quote the relevant bit
2 I've got before me -- it's: "An injunction
3 against a state court would be a violation of
4 the whole scheme of our government. The
5 difference between a power to enjoin an
6 individual from doing certain things and the
7 power to enjoin courts from proceeding in their
8 own way to exercise jurisdiction is plain, and
9 no power to do the latter exists because of the
10 power to do the former."

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

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

19 JUSTICE GORSUCH: No, I --

20 GENERAL PRELOGAR: -- against the
21 enforcement agents themselves.

22 JUSTICE GORSUCH: -- I understand
23 that, and that was Justice Breyer's point
24 earlier. But -- but *Ex parte Young* also said
25 this. And -- and I think that's just -- am I

1 wrong? How do you reconcile saying you can
2 never enjoin a court with saying you can't here?
3 Isn't -- something has to give, doesn't it?

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

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

1 JUSTICE GORSUCH: General, do you
2 agree that there are instances in which no
3 federal forum is available to adjudicate a
4 federal right?

5 GENERAL PRELOGAR: Yes, I do agree
6 that that is sometimes the case.

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

11 GENERAL PRELOGAR: Yes, that can be
12 the case.

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

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

23 GENERAL PRELOGAR: I don't want to
24 suggest that every single feature of S.B. 8
25 would necessarily have to be replicated, but I

1 think that the overall inquiry would have to
2 focus on whether the state has deliberately
3 sought to prevent any effective means of
4 judicial review.

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

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

25 And -- and the proof is in how this

1 has actually worked in practice, because
2 defamation actions haven't meant that no speech
3 occurs.

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

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

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

25 JUSTICE GORSUCH: But you'd agree --

1 GENERAL PRELOGAR: -- obstruct that.

2 JUSTICE GORSUCH: -- you'd agree that
3 tort laws for defamation have a chilling effect?

4 GENERAL PRELOGAR: Yes, but they
5 haven't chilled speech --

6 JUSTICE GORSUCH: And you'd agree that
7 --

8 GENERAL PRELOGAR: -- out of
9 existence.

10 JUSTICE GORSUCH: -- that gun control
11 laws also have a chilling effect?

12 GENERAL PRELOGAR: They can, but not
13 --

14 JUSTICE GORSUCH: And -- and you'd
15 agree --

16 GENERAL PRELOGAR: -- in the same way
17 that S.B. 8 operates.

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

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

1 JUSTICE KAGAN: You're not suggesting,
2 General Prelogar, that this right is different,
3 are you? If this exact law were promulgated --
4 were -- were -- were issued by a state that
5 wanted to be hostile to gun rights, your
6 argument would be the same, would it not?

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

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

22 And I guess the justification for that
23 is that in the abortion context, as we held in
24 the prior Whole Woman's Health case,
25 severability doesn't count. Normally, we pay

1 attention to severability clauses, but I guess,
2 when it's abortion, if there's one provision of
3 a statute that's unconstitutional, the whole
4 thing sinks. Is that your position?

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

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

21 GENERAL PRELOGAR: The difference
22 here, I think, that the district court
23 recognized is that it would actually require
24 rewriting the statute to try to reach those
25 lawful applications. And I think, in

1 particular, in this preliminary injunction
2 posture, where the court was acting on an
3 emergency basis, that kind of parsing wasn't
4 necessary.

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

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

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

1 unconstitutional, let's go bring a case.

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

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

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

24 GENERAL PRELOGAR: No, Justice Breyer,
25 we are not urging a broad authority to bring a

1 suit like this in the circumstances that you
2 identified. And I think that there are two
3 critical distinctions here that separate those
4 circumstances from the ones we confront with
5 S.B. 8.

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

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

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 I share some of the concerns that have

1 been voiced by my colleagues. You say this case
2 is very narrow, it's rare, it's -- it's -- it's
3 particularly problematic. But the authority you
4 assert to respond to it is as broad as can be.
5 It's equity, you say. We have the authority to
6 sue states under equity, which is a limitless
7 ill-defined authority.

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

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

1 CHIEF JUSTICE ROBERTS: Well, it's
2 hardly traditional to get injunctions against
3 judges, injunctions against clerks, injunctions
4 against everybody, right? That's part of the
5 relief you seek, isn't it? People -- anybody
6 can bring one of these suits, so you're seeking
7 an injunction against the world, right?

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

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

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

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

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

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

10 CHIEF JUSTICE ROBERTS: Justice
11 Thomas?

12 JUSTICE THOMAS: No questions, Chief.

13 CHIEF JUSTICE ROBERTS: Justice
14 Breyer?

15 Justice Alito?

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

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

1 JUSTICE ALITO: With the --

2 GENERAL PRELOGAR: -- this
3 constitutional violation.

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

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

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

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

20 JUSTICE ALITO: No, I understand that.

21 GENERAL PRELOGAR: And I think the
22 best example --

23 JUSTICE ALITO: But why -- but why is
24 the question whether they're acting in concert
25 with the state any different? Here, they're

1 acting in concert with Texas, you say, because
2 they are bringing suit under a Texas law.

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

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

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

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

1 can qualify as active concert --

2 JUSTICE ALITO: Well --

3 GENERAL PRELOGAR: -- or

4 participation.

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

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

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

25 JUSTICE ALITO: All right. So one

1 final question. The -- the federal rules do
2 provide a mechanism for you to do what I gather
3 you're trying to do with respect to these
4 potential private plaintiffs, and that is to
5 certify a defendant class.

6 Did you try to do that? Have you
7 satisfied the requirements of Rule 23 to do
8 that?

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

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

19 CHIEF JUSTICE ROBERTS: Justice
20 Sotomayor?

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

24 GENERAL PRELOGAR: I think that that
25 wouldn't retroactively operate to extinguish the

1 sovereign injury that the United States
2 experienced when Texas passed this law and
3 clearly attempted to thwart judicial review at a
4 time when the law was unsettled.

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

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

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

25 So how do they get the relief that

1 you're seeking? You've heard Justice Thomas --
2 Justice Alito say not everybody has been named
3 because the S.B. 8 plaintiffs have not been
4 named. So how can they be bound?

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

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

23 JUSTICE SOTOMAYOR: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice Kagan?

25 JUSTICE KAGAN: Well, is it also

1 possible that in this Whole -- in the Whole
2 Woman's Health suit that the AG could stand in
3 for the individual plaintiffs in the way that in
4 your suit the state essentially stands in for
5 the individual plaintiffs?

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

15 CHIEF JUSTICE ROBERTS: Justice
16 Gorsuch?

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

22 GENERAL PRELOGAR: No, Justice
23 Gorsuch.

24 JUSTICE GORSUCH: So this --

25 GENERAL PRELOGAR: Our injunction

1 doesn't do that either.

2 JUSTICE GORSUCH: But you said it --
3 against anyone who brings suit, right? So I did
4 include that in my limitation. Am I missing
5 something?

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

10 JUSTICE GORSUCH: Who bring suit.

11 GENERAL PRELOGAR: And so that --

12 JUSTICE GORSUCH: Yeah, that's my
13 question.

14 GENERAL PRELOGAR: -- at that point,
15 they would be identifiable.

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

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

21 JUSTICE GORSUCH: Not in the --

22 GENERAL PRELOGAR: -- that's because
23 this --

24 JUSTICE GORSUCH: -- history of the
25 United States, you can't -- you can't identify

1 one for us, right?

2 GENERAL PRELOGAR: In the history of
3 the United States, no state has done what Texas
4 has done here.

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

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

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

21 GENERAL PRELOGAR: Yes, so long as
22 they had notice of the injunction they could be.

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

1 GENERAL PRELOGAR: That's correct.

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

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

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

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

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

19 GENERAL PRELOGAR: No, the district
20 court specifically tried to facilitate notice by
21 providing that --

22 JUSTICE GORSUCH: Counsel, if you
23 could answer my question, please. Are you
24 saying that it can be entered without notice, an
25 injunction could be entered without notice,

1 you're not aware of one prior to that, and I'd
2 just like a straight answer as to whether those
3 individuals in these circumstances could be held
4 in criminal contempt or not?

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

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

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

18 JUSTICE GORSUCH: What is an --

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

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

23 GENERAL PRELOGAR: There would be
24 enforcement power here both with respect to the
25 state, with respect to the individuals who have

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

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

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

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

23 GENERAL PRELOGAR: We have brought
24 suit before. It -- it was a series of cases in,
25 I believe, the 1970s that did not work their way

1 up to this Court. The United States urged a
2 broader theory there to be able to sue to
3 vindicate constitutional rights generally.

4 But that's not the argument that we're
5 making here. Instead, we are arguing a specific
6 thing that gives us --

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

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

11 JUSTICE GORSUCH: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice
13 Kavanaugh?

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

25 Your case, by contrast, though, seems

1 -- and I'm probably repeating others' questions
2 -- just different and irregular and unusual, and
3 we don't know where it goes.

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

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

12 And I recognize, Justice Kavanaugh,
13 that this is an unusual suit. The United States
14 does not lightly invoke an authority like this
15 to sue a state. The reason we've done it here
16 is because S.B. 8 is so unprecedented,
17 extraordinary, and extraordinarily dangerous for
18 our constitutional structure. If Texas is
19 correct that it can nullify this Court's
20 precedents and it can successfully evade the
21 mechanisms that this Court recognized in Ex
22 parte Young and Congress recognized in
23 Section 1983, then no constitutional right is
24 safe.

25 And we think that in this

1 extraordinary circumstance, the United States
2 has a sovereign interest in intervening to
3 protect the supremacy of federal law.

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

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

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

1 have raised the same concern that effectively
2 the -- the state is seeking to box the judiciary
3 out of being the final arbiter of constitutional
4 rights.

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

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

15 JUSTICE KAVANAUGH: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Barrett?

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

24 Let's imagine that they do prevail on
25 a theory that the attorney general has this

1 residuum of authority and that the private
2 parties can be bound as state actors pursuant to
3 Rule 65.

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

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

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

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

1 contingent on the Whole Woman's Health
2 litigation.

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

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

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

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

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

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

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

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

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

13 JUSTICE BARRETT: Thank you.

14 CHIEF JUSTICE ROBERTS: Thank you.

15 General Stone, welcome back.

16 ORAL ARGUMENT OF JUDD E. STONE, II,

17 ON BEHALF OF THE STATE RESPONDENT

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

19 (Laughter.)

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

22 The Department of Justice's suit
23 offends the separation of powers by usurping for
24 the executive branch the role Congress plays in
25 determining what cases may be heard and what

1 remedies may be provided in the federal courts.

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

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

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

1 solution. Even if it were, and it is not, such
2 a request must be directed to Congress.

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

10 I welcome the Court's questions.

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

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

24 JUSTICE THOMAS: In re Debs.

25 MR. STONE: Your Honor, if the -- to

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

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

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

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

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

22 Now, of course, as discussed earlier
23 to Justice Barrett, that would only provide
24 relief as against that one individual. But the
25 more important part here is that eventually

1 those sorts of cases would be decided on stare
2 decisis grounds by appellate courts, which would
3 prevent follow-on cases to some extent.

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

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

24 So your argument, again, would be that
25 they are not private attorneys general because,

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

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

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

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

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

24 MR. STONE: No, Your Honor. As a
25 matter of fact, for that very specific case,

1 Congress has specifically provided DOJ --

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

8 MR. STONE: Fair enough.

9 (Laughter.)

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

15 JUSTICE BREYER: This was Arkansas in
16 1957.

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

23 JUSTICE BREYER: Yeah, but they
24 didn't. I mean, we have some experience. And
25 -- and -- and most of those cases that came up

1 in that period to this Court, the judges were
2 aware of that experience and they tried to shape
3 the law to avoid it.

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

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

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

17 JUSTICE SOTOMAYOR: So can I --

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

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

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

24 JUSTICE SOTOMAYOR: -- can I give you
25 examples where Congress hasn't? Somebody -- a

1 state dissatisfied with Heller says anyone who
2 possesses a firearm anywhere is subject to
3 litigation by any private citizen anywhere in
4 the country and gets a million dollar bounty.
5 No stare decisis. No nothing.

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

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

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

25 JUSTICE SOTOMAYOR: So your point is

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

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

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

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

22 The United States just conceded up
23 here that -- that whatever interest they had
24 would be purely retrospective, as of there being
25 some sort of ability to vindicate the -- the

1 rights that Whole Woman's Health and other
2 petitioners are trying to provide.

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

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

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

18 The United States here would want
19 effectively a follow-on injunction for, in their
20 words, in the event that the State of Texas
21 changed its law or otherwise tried to, in a way
22 of uncharitably putting it, if the State of
23 Texas changed its law to comply with this case
24 -- this state -- with this Court's law and yet,
25 nonetheless, have something like S.B. 8.

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

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

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

18 Not only are they claiming a brand new
19 sovereign interest, which can be synthesized one
20 of two ways, either in ensuring the vindication
21 of individual rights underneath this Court's --
22 underneath this Court's pronouncements in Casey
23 and substantive due process, or apparently a
24 sovereign right to ensure the expansion of
25 access to the federal courts because, after all,

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

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

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

21 MR. STONE: I'm sorry, Your Honor. I
22 thought I -- I thought I'd agreed that it
23 doesn't depend on -- that it doesn't depend on
24 the nature of the right being asserted and that
25 also none of the -- we could sort of raise the

1 potential sanction as high as possible and that
2 wouldn't -- and that wouldn't affect federal
3 court availability. I'm sorry, I thought I'd
4 answered that, but to make my answer --

5 JUSTICE KAGAN: Okay. Thank you.

6 MR. STONE: -- expressly clear.

7 JUSTICE KAGAN: Okay.

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

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

14 (Laughter.)

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

23 I mean, that was something that until
24 this law came along no state dreamed of doing.
25 And, essentially, we would be like, you know,

1 we're open for business -- you're open for
2 business. There's -- there's -- there's --
3 there's nothing the Supreme Court can do about
4 it. Guns, same sex marriage, religious rights,
5 whatever you don't like, go ahead.

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

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

21 JUSTICE KAGAN: By the way, this seems
22 a pretty extremis hypothetical actual, you know,
23 I mean, because the actual provisions in this
24 law have prevented every woman in Texas from
25 exercising a constitutional right as declared by

1 this Court.

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

3 JUSTICE KAGAN: That's not a
4 hypothetical. That's an actual.

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

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

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

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

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

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

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

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

14 MR. STONE: Absolutely, Your Honor.
15 And, again --

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

21 MR. STONE: Your Honor, the limits of
22 19 -- Section 1983 and Ex parte Young's
23 availability, specifically 1983, though,
24 Congress could extend Ex parte Young, are a
25 matter of Congress. The idea that Texas would

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

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

13 JUSTICE KAVANAUGH: But the -- but the
14 -- the --

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

21 JUSTICE KAVANAUGH: But the problem
22 they --

23 MR. STONE: -- questions of federal
24 law.

25 JUSTICE KAVANAUGH: -- the problem

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

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

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

25 I mean, another complaint of my

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

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

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

20 You know, usually, in these chilling
21 effect cases, we're kind of guessing. Well, I
22 -- this would sort of chill me. Here, we're not
23 guessing. We know exactly what has happened as
24 a result of this law. It has chilled everybody
25 on the ground.

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

6 CHIEF JUSTICE ROBERTS: Please finish
7 your answer.

8 MR. STONE: Thank you. An individual
9 could itself -- could themselves raise one of
10 these procedural mechanisms or compliance with
11 them in the state court action and say this
12 particular fees provision defending this action
13 actually is an undue burden on me because it
14 prevents me from raising my undue burden right
15 itself, or perhaps, for example, a petition
16 clause or due process clause, there might be
17 other constitutional clauses that would protect
18 an individual who's placed into a situation
19 where the rules of a court itself prevent them
20 from exercising an undue burden right, but still
21 wouldn't -- what that wouldn't get you is access
22 to pre-enforcement federal review of the
23 substantive due process right that an action --
24 an action under S.B. 8 may or may not implicate.

25 CHIEF JUSTICE ROBERTS: Thank you,

1 counsel.

2 Justice Thomas, anything further?

3 JUSTICE THOMAS: No, Chief.

4 CHIEF JUSTICE ROBERTS: Justice
5 Breyer?

6 Justice Alito?

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

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

21 JUSTICE ALITO: Would the issuance of
22 the injunction sought by the United States have
23 any effect on liability for abortions performed
24 after the effective date of this act?

25 MR. STONE: So it would prevent -- it

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

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

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

22 JUSTICE ALITO: Thank you.

23 CHIEF JUSTICE ROBERTS: Justice
24 Sotomayor?

25 JUSTICE SOTOMAYOR: Nothing.

1 CHIEF JUSTICE ROBERTS: Justice Kagan?
2 Justice Gorsuch?
3 Justice Kavanaugh?

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

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

20 JUSTICE KAVANAUGH: Is that a yes?

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

22 JUSTICE KAVANAUGH: And is there any
23 limit on that retroactive liability?

24 MR. STONE: There might be. Again, it
25 -- I'd have to hypothesize, perhaps a due

1 process claim if it were -- in some extreme
2 circumstance. But, no, there's nothing on the
3 face of S.B. 8 that would provide it.

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

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

15 JUSTICE KAVANAUGH: Almost certainly,
16 so, right? Millions and millions retroactively
17 imposed, even though the activity was perfectly
18 lawful under all court orders and precedent at
19 the time it was undertaken, right?

20 MR. STONE: Undoubtedly, Your Honor.
21 But --

22 JUSTICE KAVANAUGH: Okay.

23 CHIEF JUSTICE ROBERTS: Justice
24 Barrett?

25 JUSTICE BARRETT: I just have one

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

15 What if, in addition to the other
16 procedural obstacles that the law contains here,
17 the legislature also added a provision saying
18 there would be no stare decisis effect of any
19 decision reached by the Texas Supreme Court?

20 MR. STONE: Then, Your Honor, I would
21 assume it would make it even more imperative for
22 one of those cases to be taken up by this Court
23 to resolve any questions that were -- that were
24 presented there. But that would mean that would
25 be the only final way that you could have

1 binding stare -- stare decisis effect.

2 JUSTICE BARRETT: Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you,
4 counsel.

5 Mr. Mitchell.

6 ORAL ARGUMENT OF JONATHAN F. MITCHELL

7 ON BEHALF OF THE PRIVATE RESPONDENTS

8 MR. MITCHELL: Mr. Chief Justice, and
9 may it please the Court:

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

21 The United States also cannot seek or
22 obtain relief that would prevent private
23 individuals from suing under S.B. 8, because any
24 such relief would be a flagrant violation of the
25 Due Process Clause. A federal court cannot ban

1 private individuals from petitioning the courts
2 in a case to which they have not been made a
3 party. And a federal court cannot foreclose
4 those individuals from suing under S.B. 8 when
5 they have been given no opportunity to defend
6 the merits of the lawsuit that they intend to
7 bring.

8 I welcome the Court's questions.

9 CHIEF JUSTICE ROBERTS: I guess one
10 would be you -- you've heard the exchanges with
11 General Prelogar about the breadth of the
12 asserted federal right.

13 MR. MITCHELL: Yes.

14 CHIEF JUSTICE ROBERTS: And she
15 offered some answers to those questions about
16 the limited nature. And I wanted to get your
17 reaction to that.

18 MR. MITCHELL: Yes. And, Chief
19 Justice Roberts, as I understand the United
20 States' argument as they've spelled it out on
21 pages 10 and 20 of their brief, the -- the
22 asserted sovereign interest that they're making
23 under In re Des depends entirely on the
24 existence of a congressional enactment,
25 Section 1983, that does not go far enough in the

1 views of the United States.

2 What they're saying with respect to
3 their sovereign interest is that Texas is
4 thwarting Section 1983 and Ex parte Young by
5 enacting a statute that is not subject to
6 pre-enforcement challenge under either of those
7 sources of law.

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

16 The proper response in that situation
17 is to go to Congress and ask Congress to amend
18 the remedies that they have set forth, either by
19 abrogating state sovereign immunity or perhaps
20 by enacting the Women's Health Protection Act,
21 which would preempt S.B. 8 and also abrogate
22 state immunity and give the attorney general the
23 explicit cause of action. But in no way can
24 equity be invoked to patch up the holes or the
25 perceived holes in a statute that Congress has

1 enacted.

2 The second issue with respect to the
3 sovereign interests that the United States
4 asserts surrounds Ex parte Young because they
5 claim in their brief that Ex parte Young does
6 not go far enough in authorizing a
7 pre-enforcement challenge.

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

17 And Ex parte Young explicitly
18 disclaims any such remedy on page 163 when it
19 says that an injunction against a state court
20 would be a violation of our whole scheme of
21 government.

22 So what the --

23 CHIEF JUSTICE ROBERTS: Well, but at
24 the same time, subsequent cases suggest that
25 that language can't be read as broadly as you

1 suggest, Shelley against Kraemer, Terry against
2 Adams, some of the others where they've
3 recognized that courts can be viewed as part of
4 a mechanism of enforcing particular rights.

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

16 So it's impossible to escape the
17 conclusion that this relief requested by the
18 United States is barred --

19 CHIEF JUSTICE ROBERTS: Well, I mean
20 --

21 MR. MITCHELL: -- by Grupo Mexicano.

22 CHIEF JUSTICE ROBERTS: Well, Grupo
23 Mexicano is notoriously cryptic. And Shelley
24 against Kraemer, Terry against Adams, they
25 aren't really -- I mean, if you look at Justice

1 Frankfurter's opinion in Terry, he says, you
2 know, somewhere, somehow, to some extent, you
3 have to have some participation. That seems
4 like a pretty flexible standard.

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

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

25 CHIEF JUSTICE ROBERTS: Well, there is

1 an Article III case or controversy with respect
2 to the clerks, right? It's a direct adversity.
3 The clerks want to file the action, and the
4 plaintiffs is don't want them to.

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

16 There wouldn't be a case or
17 controversy with the United States simply
18 because it's opening its courtroom doors to
19 these claims. What they would have to do is
20 wait for the cases to be filed and then assert
21 their constitutional challenges to the statute
22 in that litigation between the private citizens.

23 JUSTICE KAVANAUGH: Do you agree, to
24 follow up on the Chief Justice's questions, that
25 state clerks, court clerks, and state judges

1 enforce state law when they entertain private
2 civil suits?

3 MR. MITCHELL: No, I don't believe
4 they can be said to be enforcing state law in
5 those situations --

6 JUSTICE KAVANAUGH: How do you deal
7 with all the language in Shelley versus Kraemer
8 that says -- that uses the word enforce?

9 MR. MITCHELL: Because I think in that
10 context enforcement is coming after a judgment
11 has been entered by the court and then the
12 judgment is being enforced.

13 But simply adjudicating a case at the
14 outset and simply docketing a complaint, that is
15 not enforcement.

16 And this goes to another problem with
17 the remedy that the United States is seeking
18 with respect to the private individuals. They
19 are asking the Court to restrain Texas from
20 adjudicating lawsuits. They want to stop the
21 clerks from docketing the complaints. They want
22 to stop the judges from hearing or presiding
23 over the cases.

24 And then they say that injunction
25 should extend to private individuals under Rule

1 65(d)(2)(c). The problem is the private
2 individuals aren't doing any of those things
3 that the state has been enjoined from doing.
4 They're doing something entirely different.

5 They are the ones who are filing the
6 lawsuits. And the state can't file the lawsuit
7 because it's not allowed to file it under the
8 statute.

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

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

20 JUSTICE SOTOMAYOR: Counsel, a state
21 is an idealized entity. The whole fiction of Ex
22 parte Young, it had to be created because a
23 state qua state can't act. It can only
24 designate people to act for it.

25 And so if the state is designating

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

7 MR. MITCHELL: They wouldn't --

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

16 MR. MITCHELL: They would be bound if
17 they can satisfy the test of Rule 65(d)(2)(c)
18 which says they have to be acting in active
19 concert --

20 JUSTICE SOTOMAYOR: Why? They are.

21 MR. MITCHELL: No.

22 JUSTICE SOTOMAYOR: Each of them is
23 acting under the directives of the state law.
24 So why aren't they acting like the state when
25 they act?

1 MR. MITCHELL: No, Justice Sotomayor,
2 I -- I respectfully disagree with that
3 characterization.

4 JUSTICE SOTOMAYOR: The --

5 MR. MITCHELL: The state --

6 JUSTICE SOTOMAYOR: I know you
7 disagree.

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

9 JUSTICE SOTOMAYOR: But I'm trying to
10 get you --

11 MR. MITCHELL: -- I'm going to explain
12 why I disagree with it. The state is not in any
13 way directing the activity. May I answer?

14 CHIEF JUSTICE ROBERTS: Please.

15 MR. MITCHELL: The state is not
16 directing the activity of these private
17 individuals. The state has passed a law that
18 gives them the option to sue and then it has
19 washed its hands of the matter.

20 So there is no joint participation
21 with the state in their --

22 JUSTICE SOTOMAYOR: How is --

23 MR. MITCHELL: -- decision.

24 JUSTICE SOTOMAYOR: -- that any
25 different than there being state action when a

1 prosecutor exercises a discriminatory Batson
2 challenge or how is there state action when
3 state primary actors exclude races or exclude
4 people from primaries, and we've called that
5 state action, even though the state has just
6 given them the authority to act with no control
7 over what they're going to do?

8 MR. MITCHELL: Right. So --

9 JUSTICE SOTOMAYOR: So we have
10 recognized that people -- that washing your
11 hands doesn't insulate a state.

12 MR. MITCHELL: With -- with your
13 example on the --

14 JUSTICE SOTOMAYOR: Or insulate people
15 from acting on behalf of the state.

16 MR. MITCHELL: The prosecutor in your
17 hypothetical is an employee of the state. He is
18 part of a state government. He is part of the
19 machine of the estate. The white primary
20 example is a more difficult question because
21 they were formerly established as a private
22 entity.

23 JUSTICE SOTOMAYOR: Are you suggesting
24 that states can hire agents to do
25 unconstitutional acts?

1 MR. MITCHELL: No, they cannot hire
2 agents --

3 JUSTICE SOTOMAYOR: So what's --

4 MR. MITCHELL: -- no.

5 JUSTICE SOTOMAYOR: How can the state
6 designate a private individual --

7 MR. MITCHELL: Because --

8 JUSTICE SOTOMAYOR: -- to act on its
9 -- under its laws to violate a person's
10 constitutional right?

11 MR. MITCHELL: There is not an agency
12 relationship here, Justice Sotomayor. These --

13 JUSTICE SOTOMAYOR: It's -- it's
14 saying to it you, under this law, our law, you
15 can act.

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

18 CHIEF JUSTICE ROBERTS: Briefly.

19 MR. MITCHELL: Yes, I'm sorry.
20 Justice Sotomayor, if there were an agency
21 relationship, then Your Honor would be correct,
22 they would be bound by an injunction under the
23 principles of Rule 65.

24 But there is no agency relationship
25 here because the state is statutorily forbidden

1 to enforce the law or have any enforcement role
2 whatsoever.

3 That role is given to private
4 citizens. The state can't have any involvement.
5 So there can't be joint conduct with the state,
6 with respect to that particular activity.

7 CHIEF JUSTICE ROBERTS: Thank you.

8 Justice Thomas?

9 Justice Breyer?

10 Justice Alito?

11 Justice Sotomayor?

12 Justice Kagan?

13 Justice Gorsuch?

14 Justice Barrett?

15 Thank you, counsel.

16 MR. MITCHELL: Thank you, Your Honors.

17 CHIEF JUSTICE ROBERTS: Rebuttal?

18 REBUTTAL ARGUMENT OF ELIZABETH B.

19 PRELOGAR ON BEHALF OF THE PETITIONER

20 GENERAL PRELOGAR: Thank you, Mr.

21 Chief Justice.

22 I would like to just make three points
23 in rebuttal. And I would like to begin with the
24 point that I understood General Stone to be
25 making that, if this Court ultimately concludes

1 in Whole Woman's Health that the providers can
2 sue, that the authority we're claiming here to
3 sue as well is extraordinary or unprecedented.

4 And I think it is important to
5 recognize that when the United States of America
6 filed this suit to try to redress the harm to
7 the supremacy of federal law in Texas, the Whole
8 Woman's Health's providers had not been able to
9 obtain any effective redress from the courts.

10 The law had been permitted to take
11 effect and it had immediately had its intended
12 operation of chilling the exercise of
13 constitutionally-protected conduct altogether,
14 so that abortions that are protected under Roe
15 and Casey after six weeks of pregnancy could not
16 occur at all.

17 And I think that that shows the threat
18 to the supremacy that comes from this attempted
19 design of a law to block access to the
20 judiciary.

21 It may well be, and I hope that this
22 Court holds in Whole Woman's Health that the
23 providers can move forward, but that hasn't
24 stopped the harm to the sovereign interest of
25 the United States in the meantime, as Texas has

1 succeeded, while these novel issues worked their
2 way through the courts, in blocking access to
3 care that is protected under this Court's
4 precedents.

5 And that leads me to my second point,
6 which is to emphasize the nature of the
7 sovereign interest here. It is in preventing a
8 state from being able to act in direct defiance
9 of this Court's precedents and block access to
10 the judicial review that Congress and this Court
11 have deemed necessary to vindicate federal
12 rights and to further make it -- the state court
13 mechanism that might provide some alternative
14 basis for raising those constitutional claims,
15 wholly ineffective and unavailable.

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

19 Across the arguments this morning
20 Texas's position is that no one can sue, not the
21 women whose rights are most directly affected,
22 not the providers who have been chilled in being
23 able to provide those women with care, and not
24 the United States in this suit.

25 They say that federal courts just have

1 no authority under existing law to provide any
2 mechanism to redress that harm.

3 And if that is true, if a state can
4 just take this simple mechanism of taking its
5 enforcement authority and giving it to the
6 general public backed up with a bounty of
7 \$10,000 or \$1 million, if they can do that then
8 no constitutional right is safe. No
9 constitutional decision from this Court is safe.

10 That would be an intolerable state of
11 affairs and it cannot be the law. Our
12 constitutional guarantees cannot be that
13 fragile. And the supremacy of federal law
14 cannot be that easily subject to manipulation.

15 So we would ask this Court to hold
16 that the United States can proceed with this
17 action and affirm the preliminary injunction
18 entered by the district court and immediately
19 vacate the stay that the Fifth Circuit entered
20 in this case so that Texas cannot continue to
21 deny women in its borders a right protected by
22 this Court's precedents one day longer.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel. The case is submitted.

25

1 (Whereupon, at 12:55 p.m., the case
2 was submitted.)
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