

# SUPREME COURT OF THE UNITED STATES

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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. )  
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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 acknowledge at the outset that we  
25 can't point to a case that looks exactly like

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

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

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



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

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

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

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

24 JUSTICE THOMAS: Well, even if --

25 GENERAL PRELOGAR: -- safeguard

1 federal rights.

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

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

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

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

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

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

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

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

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

3           And there were three relevant  
4 features. First, the district court said that  
5 the injunction would appropriately bind those  
6 S.B. 8 plaintiffs who actually choose to  
7 exercise the state's enforcement authority. And  
8 so those who actually file suit thereby act in  
9 concert or active participation 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 But the problem is that the state has  
23 specifically, by delegating to members of the  
24 general public this enforcement authority, it's  
25 specifically made it impossible to determine in

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

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

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

23 JUSTICE ALITO: You know, General, I  
24 -- I appreciate your point. Texas says, you  
25 say, has done everything it possibly can to try

1 to make it difficult for abortion providers to  
2 vindicate their rights under our precedents.

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

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

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

22 Start with the judges. It's  
23 unprecedented and it is contrary to our system  
24 of federalism to enjoin a state judge even from  
25 hearing a case. When has that been done and how

1 can that be justified?

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

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

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

25           GENERAL PRELOGAR: While I certainly



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

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

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

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

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

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

24 GENERAL PRELOGAR: No, I don't think  
25 that the injunction could properly reach the

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

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

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

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

24           GENERAL PRELOGAR: That -- that is not  
25 what I mean to suggest. Here, the injunction

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

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

16           JUSTICE GORSUCH: So -- so --

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

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

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

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

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

16 JUSTICE GORSUCH: No, I --

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

19 JUSTICE GORSUCH: -- I understand  
20 that, and that was Justice Breyer's point  
21 earlier. But -- but *Ex parte Young* also said  
22 this. And -- and I think that's just -- am I  
23 wrong? How do you reconcile saying you can  
24 never enjoin a court with saying you can here?  
25 Isn't -- something has to give, doesn't it?

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

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

23                   JUSTICE GORSUCH: General, do you  
24 agree that there are instances in which no  
25 federal forum is available to adjudicate a

1 federal right?

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

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

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

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

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

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

1 judicial review.

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

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

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

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

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

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

22 JUSTICE GORSUCH: But you'd agree --

23 GENERAL PRELOGAR: -- obstruct that.

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



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

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

5                   GENERAL PRELOGAR:  -- out of  
6 existence.

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

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

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

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

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

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

23                   JUSTICE KAGAN:  You're not suggesting,  
24 General Prelogar, that this right is different,  
25 are you?  If this exact law were promulgated --

1 were -- were -- were issued by a state that  
2 wanted to be hostile to gun rights, your  
3 argument would be the same, would it not?

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

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

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

1 thing sinks. Is that your position?

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

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

18 GENERAL PRELOGAR: The difference  
19 here, I think, that the district court  
20 recognized is that it would actually require  
21 rewriting the statute to try to reach those  
22 lawful applications. And I think, in  
23 particular, in this preliminary injunction  
24 posture, where the court was acting on an  
25 emergency basis, that kind of parsing wasn't

1 necessary.

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

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

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

24           Now, if we accept your argument, I  
25 guess that person has a good point. I'm a

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

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

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

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

1       circumstances from the ones we confront with  
2       S.B. 8.

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

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

20                CHIEF JUSTICE ROBERTS: Thank you,  
21       counsel.

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

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

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

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

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

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

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

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

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

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

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

25 But we do not think that a recognition



1 here that the United States can -- can intervene  
2 to try to protect the supremacy of federal law  
3 would open the floodgates in the mine-run  
4 situations where a state is simply applying a  
5 private right of action through ordinary and  
6 fair state court proceedings.

7 CHIEF JUSTICE ROBERTS: Justice  
8 Thomas?

9 JUSTICE THOMAS: No questions, Chief.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Breyer?

12 Justice Alito?

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

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

23 JUSTICE ALITO: With the --

24 GENERAL PRELOGAR: -- this  
25 constitutional violation.

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

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

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

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

17 JUSTICE ALITO: No, I understand that.

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

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

25 So, if somebody brings suit in

1 Maryland under Maryland defamation law, they're  
2 acting in concert with Maryland, is that right?

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

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

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

24 JUSTICE ALITO: Well --

25 GENERAL PRELOGAR: -- or

1 participation.

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

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

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

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

1 potential private plaintiffs, and that is to  
2 certify a defendant class.

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

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

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

16 CHIEF JUSTICE ROBERTS: Justice  
17 Sotomayor?

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

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

1 at a time when the law was unsettled.

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

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

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

22 So how do they get the relief that  
23 you're seeking? You've heard Justice Thomas --  
24 Justice Alito say not everybody has been named  
25 because the S.B. 8 plaintiffs have not been

1 named. So how can they be bound?

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

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

20 JUSTICE SOTOMAYOR: Thank you.

21 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

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

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

12 CHIEF JUSTICE ROBERTS: Justice  
13 Gorsuch?

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

19 GENERAL PRELOGAR: No, Justice  
20 Gorsuch.

21 JUSTICE GORSUCH: So this --

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

24 JUSTICE GORSUCH: But you said it --  
25 against anyone who brings suit, right? So I did



1 include that in my limitation. Am I missing  
2 something?

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

7 JUSTICE GORSUCH: Who bring suit.

8 GENERAL PRELOGAR: And so that --

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

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

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

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

18 JUSTICE GORSUCH: Not in the --

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

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

24 GENERAL PRELOGAR: In the history of  
25 the United States, no state has done what Texas

1 has done here.

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

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

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

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

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

24 GENERAL PRELOGAR: That's correct.

25 JUSTICE GORSUCH: Okay. Are you aware

1 of another circumstance where an injunction's  
2 been issued where contempt's not possible?

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

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

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

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

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

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

1 individuals in these circumstances could be held  
2 in criminal contempt or not.

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

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

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

16 JUSTICE GORSUCH: What is an --

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

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

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

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

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

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

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

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

1 vindicate constitutional rights generally.

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

4 JUSTICE GORSUCH: Okay.

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

7 JUSTICE GORSUCH: Besides that one  
8 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 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.

19           If Texas is correct that it can  
20 nullify this Court's precedents and it can  
21 successfully evade the mechanisms that this  
22 Court recognized in *Ex parte Young* and Congress  
23 recognized in Section 1983, then no  
24 constitutional right is 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, or  
7 take the case over, like in a qui tam action,  
8 those sorts of answers that I was providing  
9 earlier, 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 My -- I'm getting your answer is no, you cannot  
6 think 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 that no matter how much a state intends to chill  
2 the exercise of a constitutional right, as the  
3 Chief said, imposing a million dollar liability  
4 for an act which I think almost any sane person  
5 except a couple of billionaires might choose to  
6 resist, that that does not give anyone a right  
7 to a federal forum when the state has deputized  
8 every 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 Barris made --  
15 Barrett made at the end of my friend's previous  
16 argument.

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

23 The United States just conceded up  
24 here that -- that whatever interest they had  
25 would be purely retrospective as of there being

1 some sort of ability to vindicate the -- the  
2 rights that Whole Woman's Health and other  
3 petitioners are trying to provide.

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

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

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

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

1       nonetheless, have something like S.B. 8.

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

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

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

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



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

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

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

22 MR. STONE: I'm sorry, Your Honor. I  
23 thought I -- I thought I'd agreed that it  
24 doesn't depend on -- that it doesn't depend on  
25 the nature of the right being asserted and that

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

6 JUSTICE KAGAN: Okay. Thank you.

7 MR. STONE: -- expressly clear.

8 JUSTICE KAGAN: Okay.

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

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

15 (Laughter.)

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

24 I mean, that was something that until  
25 this law came along no state dreamed of doing.

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

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

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

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

1 exercising a constitutional right as declared by  
2 this Court.

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

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

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

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

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

1 courts of the State of Texas.

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

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

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

1 functions.

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

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

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

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

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

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

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

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

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

22 JUSTICE KAVANAUGH: But the problem  
23 they --

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

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

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

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



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

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

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

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

1 chilled everybody on the ground.

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

7 CHIEF JUSTICE ROBERTS: Please finish  
8 your answer.

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

1 CHIEF JUSTICE ROBERTS: Thank you,  
2 counsel.

3 Justice Thomas, anything further?

4 JUSTICE THOMAS: No, Chief.

5 CHIEF JUSTICE ROBERTS: Justice  
6 Breyer?

7 Justice Alito?

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

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

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

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

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

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

23           JUSTICE ALITO: Thank you.

24           CHIEF JUSTICE ROBERTS: Justice  
25 Sotomayor?

1 JUSTICE SOTOMAYOR: Nothing.

2 CHIEF JUSTICE ROBERTS: Justice Kagan?

3 Justice Gorsuch?

4 Justice Kavanaugh?

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

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

21 JUSTICE KAVANAUGH: Is that a yes?

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

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

25 MR. STONE: There might be. Again,

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

5 JUSTICE KAVANAUGH: Doesn't that play  
6 into the chilling effect argument that was being  
7 raised that, presumably, one of the concerns is  
8 even though you would challenge it today and  
9 think -- you would engage in the activity today  
10 because you would be confident, you're chilled  
11 by the prospect of future changes and then  
12 someone reaching back and imposing millions and  
13 millions of dollars of -- right?

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

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

19 MR. STONE: Undoubtedly.

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

24 MR. STONE: Undoubtedly, Your Honor.

25 JUSTICE KAVANAUGH: Okay.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Barrett?

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

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

24 MR. STONE: Then, Your Honor, I would  
25 assume it would make it even more imperative for

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

6 JUSTICE BARRETT: Thank you.

7 CHIEF JUSTICE ROBERTS: Thank you,  
8 counsel.

9 Mr. Mitchell.

10 ORAL ARGUMENT OF JONATHAN F. MITCHELL  
11 ON BEHALF OF THE PRIVATE RESPONDENTS

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

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

25 The United States also cannot seek or



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

12 I welcome the Court's questions.

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

17 MR. MITCHELL: Yes.

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

22 MR. MITCHELL: Yes. And, Chief  
23 Justice Roberts, as I understand the United  
24 States' argument as they've spelled it out on  
25 pages 10 and 20 of their brief, the -- the

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

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

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

20            The proper response in that situation  
21    is to go to Congress and ask Congress to amend  
22    the remedies that they have set forth, either by  
23    abrogating state sovereign immunity or perhaps  
24    by enacting the Women's Health Protection Act,  
25    which would preempt S.B. 8 and also abrogate

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

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

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

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

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

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

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

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

24                   MR. MITCHELL: -- by Grupo Mexicano.

25                   CHIEF JUSTICE ROBERTS: Well, Grupo

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

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

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

1 because the relief they seek is not relief that  
2 is traditionally available.

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

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

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

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

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

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

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

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

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

1 to stop the judges from hearing or presiding  
2 over the cases.

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

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

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

23 JUSTICE SOTOMAYOR: Counsel, a state  
24 is an idealized entity. The whole fiction of Ex  
25 parte Young had to be created because a state



1 qua state can't act. It can only designate  
2 people to act for it.

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

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

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

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

24 JUSTICE SOTOMAYOR: Why? They are.

25 MR. MITCHELL: No.

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

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

8 JUSTICE SOTOMAYOR: The --

9 MR. MITCHELL: The state --

10 JUSTICE SOTOMAYOR: I know you  
11 disagree.

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

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

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

17 JUSTICE SOTOMAYOR: Go ahead.

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

20 CHIEF JUSTICE ROBERTS: Please.

21 MR. MITCHELL: The state is not  
22 directing the activity of these private  
23 individuals. The state has passed a law that  
24 gives them the option to sue and then it has  
25 washed its hands of the matter. So there is no

1 joint participation with the state in their --

2 JUSTICE SOTOMAYOR: How is --

3 MR. MITCHELL: -- decision.

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

8 MR. MITCHELL: May I?

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

15 MR. MITCHELL: Right. So --

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

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

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

23 MR. MITCHELL: Yes. The prosecutor in  
24 your hypothetical is an employee of the state.  
25 He's part of a state government. He's part of

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

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

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

10 JUSTICE SOTOMAYOR: So what's --

11 MR. MITCHELL: -- no.

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

14 MR. MITCHELL: Because these --

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Briefly in the

1 rule.

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

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

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

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

15 CHIEF JUSTICE ROBERTS: Thank you.

16 Justice Thomas?

17 JUSTICE THOMAS: Nothing, Chief.

18 CHIEF JUSTICE ROBERTS: Justice

19 Breyer?

20 Justice Alito?

21 Justice Sotomayor?

22 Justice Kagan?

23 Justice Gorsuch?

24 Justice Barrett?

25 Okay. Thank you, counsel.

1 MR. MITCHELL: Thank you, Your Honors.

2 CHIEF JUSTICE ROBERTS: Rebuttal?

3 REBUTTAL ARGUMENT OF ELIZABETH B.

4 PRELOGAR ON BEHALF OF THE PETITIONER

5 GENERAL PRELOGAR: Thank you, Mr.

6 Chief Justice.

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

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

20 The law had been permitted to take  
21 effect and it had immediately had its intended  
22 operation of chilling the exercise of  
23 constitutionally protected conduct altogether so  
24 that abortions that are protected under Roe and  
25 Casey after six weeks of pregnancy could not

1 occur at all. And I think that that shows the  
2 threat to the supremacy that comes from this  
3 attempted design of a law to block access to the  
4 judiciary.

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

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

25           The final point is to just step back

1 for a moment and -- and think about the  
2 startling implications of Texas's argument here.

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

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

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

24 So we would ask this Court to hold  
25 that the United States can proceed with this



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

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

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

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## Official

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