

1 IN THE SUPREME COURT OF THE UNITED STATES
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3 WHOLE WOMAN'S HEALTH, ET AL.,)
4 Petitioners,)
5 v.) No. 21-463
6 AUSTIN REEVE JACKSON, JUDGE,)
7 DISTRICT COURT OF TEXAS,)
8 114TH DISTRICT, ET AL.,)
9 Respondents.)
10 - - - - -
11
12 Washington, D.C.
13 Monday, November 1, 2021
14
15 The above-entitled matter came on for oral
16 argument before the Supreme Court of the United States
17 at 10:03 a.m.
18
19 APPEARANCES:
20
21 MARC A. HEARRON, ESQUIRE, Washington, D.C.; on behalf
22 of the Petitioners.
23 JUDD E. STONE, II, Solicitor General, Austin, Texas;
24 on behalf of the Respondents.
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P R O C E E D I N G S

(10:03 a.m.)

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

Mr. Hearron.

ORAL ARGUMENT OF MARC A. HEARRON

ON BEHALF OF THE PETITIONERS

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

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

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

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

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

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

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

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

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

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

6 JUSTICE THOMAS: Counsel, you rely on
7 Ex parte Young to some extent, but Ex parte
8 Young makes clear that federal courts cannot
9 enjoin state judges. So how do you distinguish
10 your case from the express language in Ex parte
11 Young?

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

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

24 JUSTICE THOMAS: But --

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

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

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

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

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

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

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

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

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

18 JUSTICE SOTOMAYOR: Counsel --

19 JUSTICE ALITO: You --

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

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

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

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

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

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

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

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

1 Second, it allows those suits to be
2 brought anywhere in Texas, even for one
3 abortion.

4 So an abortion provider could face
5 suits all across the state for a single
6 abortion, multiplied by all the -- the
7 additional abortions that are provided.

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

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

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

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

24 Isn't it the case that the Texas
25 constitution requires a plaintiff to show injury

1 in fact in accordance with the same standard
2 that applies in federal court? One of the first
3 points you made, I think maybe the first point,
4 was that S.B. 8 allows anybody to sue, whether
5 or not that person has suffered any injury.

6 Is that accurate under Texas law?

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

15 They said that at page 49 of the
16 transcript of the preliminary injunction
17 hearing. And Texas courts --

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

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

1 JUSTICE ALITO: Well, of course,
2 they're not, but they are bound to follow the
3 State Supreme Court, are they not?

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

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

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

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

1 think that -- that there are a number --

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

4 MR. HEARRON: -- of reasons --

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

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

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

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

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

23 MR. HEARRON: But, in the normal case,
24 if you win that case, if you -- if you win, then
25 you don't have to continue litigating that.

1 Here, S.B. 8 says there is no preclusive effect.

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

5 MR. HEARRON: Yes.

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

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

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

23 JUSTICE BARRETT: Counsel --

24 MR. HEARRON: -- the exercise --

25 JUSTICE BARRETT: -- even apart from

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

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

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

25 Do you read that the same way?

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

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

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

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

15 JUSTICE ALITO: Well, wouldn't --

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

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

1 unclear exactly how the Texas courts would apply
2 that, whether they would follow the undue burden
3 standard.

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

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

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

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

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

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

22 MR. HEARRON: I'm -- I'm not
23 suggesting that they would not abide by the
24 Constitution. What I'm saying is that even if
25 you have to prove that undue burden defense in

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

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

15 JUSTICE SOTOMAYOR: Counsel --

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

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

22 Justice Barrett pointed out to a
23 provision of this law that says you can't
24 present this claim this way, all right? Whether
25 the judges -- what the judges will do is

1 irrelevant.

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

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

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

12 MR. HEARRON: The --

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

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

1 other side's fees --

2 JUSTICE KAVANAUGH: Mr. Hearron --

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

5 JUSTICE KAVANAUGH: Keep going.
6 Sorry.

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

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

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

24 The Ex parte Young principle is that
25 those who enforce the law can be enjoined or can

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

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

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

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

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

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

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

8 MR. HEARRON: No.

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

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

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

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

18 MR. HEARRON: That's right, and, in
19 fact, Judge Jackson at a press conference said
20 he's the enforcer of the laws in east Texas.
21 And -- and I think that that's clearly -- it's
22 clearly correct that when the court issues an
23 injunction, a mandatory injunction, or issues
24 them monetary penalties, what the court is doing
25 is enforcing S.B. 8.

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

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

15 JUSTICE ALITO: I mean, really?

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

18 JUSTICE ALITO: I mean, suppose --

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

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

1 MR. HEARRON: I think, in --

2 JUSTICE ALITO: Even --

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

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

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

16 JUSTICE BREYER: Who --

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

19 JUSTICE BREYER: Were you finished?
20 Because I'm -- I'm taking up his argument.
21 Look, you -- you -- you say a judge is, at least
22 in many circumstances, an enforcer. There are 4
23 billion tort suits in the United States, okay?
24 And probably in 3 billion of them, somebody
25 thinks something is unconstitutional. All

1 right? So can they all sue the judge?

2 MR. HEARRON: No.

3 JUSTICE BREYER: Everybody goes into
4 federal court and sues the judge?

5 MR. HEARRON: No, Your Honor.

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

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

1 nullify constitutional rights.

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

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

16 MR. HEARRON: So I think there is a
17 case or controversy, and if I could address the
18 clerks first, that there -- there's adversity in
19 a case or controversy against the clerks, Your
20 Honor, because the clerks are saying they have a
21 duty under state law to docket a petition, to --
22 to issue summonses. And we are saying that
23 the -- even the initiation of an enforcement
24 proceeding violates constitutional rights and
25 that they should not docket. That is adversity.

1 It doesn't matter whether the clerks agree with
2 the law or want to defend the law.

3 JUSTICE ALITO: I mean, the clerk --

4 MR. HEARRON: That alone is --

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

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

17 MR. HEARRON: Well, Your Honor, that's
18 -- that's why we have asked for declaratory
19 relief against the judges, but I think that -- I
20 do think --

21 JUSTICE ALITO: So you've got to get
22 to the judges.

23 MR. HEARRON: -- that relief against
24 the clerks --

25 JUSTICE ALITO: This business about

1 the clerks is a, you know --

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

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

20 So we know there will be enforcement,
21 and the ministerial act of the clerk's docketing
22 is exactly what -- the state has made the clerks
23 an essential role in the -- in this machinery
24 that they have created to nullify constitutional
25 rights that have been recognized by this Court.

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

5 MR. HEARRON: So our -- our first
6 argument is actually that Congress created the
7 right in Section 1983.

8 JUSTICE BARRETT: Assume we don't go
9 -- assume I don't buy that.

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

20 JUSTICE BARRETT: It's -- okay. It --
21 I -- I think there is language in Ex parte Young
22 that favors you. And I don't think Thunder
23 Basin -- I think Thunder Basin assumes that
24 there might be some circumstances in which
25 pre-enforcement review is constitutionally

1 required.

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

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

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

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

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 Justice Thomas, anything further?

22 JUSTICE THOMAS: No, Chief.

23 CHIEF JUSTICE ROBERTS: Justice
24 Breyer?

25 JUSTICE BREYER: I'd like to just be

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

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

21 I have six that I caught from you. Is
22 there a seventh?

23 MR. HEARRON: I have two more, Your
24 Honor.

25 JUSTICE BREYER: Okay.

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

4 And the -- the second one is that S.B.
5 8 provides for a mandatory injunction, if there
6 is a successful claimant, to prevent further
7 violations, not to prevent further harm to the
8 claimant. It's -- it's not tied to -- the --
9 the mandatory injunction is not tied to the
10 harm.

11 JUSTICE BREYER: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Alito?

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

21 And you say the clerk should say what?

22 MR. HEARRON: The clerk should reject
23 the filing of that lawsuit.

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

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

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

11 JUSTICE SOTOMAYOR: Contract or
12 otherwise, common law tort or contract?

13 MR. HEARRON: Yes.

14 JUSTICE SOTOMAYOR: Thank you.

15 CHIEF JUSTICE ROBERTS: Justice Kagan?

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

22 MR. HEARRON: We are requesting an
23 injunction. So we have a -- a pending class
24 certification motion for a defendant class
25 against the clerks, so we would be requesting an

1 injunction against the commencement or the
2 docketing of lawsuits against the clerks of the
3 -- across the State of Texas, as well as
4 injunctive relief against the state executive
5 officials for their residual authority to
6 enforce S.B. 8.

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

15 Is -- is that correct? Is that what
16 we would be doing?

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

24 JUSTICE KAGAN: Yeah. And while the
25 district court does all that, which we're --

1 which we would be saying the district court
2 should go do, do you -- have you made a motion
3 for interim relief?

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

11 But -- but -- but -- but the in -- the
12 motion for interim relief is in that case, not
13 in your case.

14 Am -- am I wrong about that, or do you
15 have a motion in your case that would enable
16 interim relief?

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

25 So we would ask the Court to -- to

1 issue such interim relief.

2 JUSTICE KAGAN: Thank you, Mr.
3 Hearron.

4 JUSTICE SOTOMAYOR: Would the Chief
5 permit me a follow-up on that?

6 CHIEF JUSTICE ROBERTS: Sure.

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

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

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

24 JUSTICE SOTOMAYOR: Were you granted a
25 stay of enforcement of the law?

1 MR. HEARRON: Were we granted --

2 JUSTICE SOTOMAYOR: By the district
3 court?

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

6 JUSTICE SOTOMAYOR: Ah, okay. Thank
7 you.

8 MR. HEARRON: Yes. We -- we did not
9 yet --

10 JUSTICE SOTOMAYOR: I forgot.

11 MR. HEARRON: We --

12 JUSTICE SOTOMAYOR: Thank you.

13 MR. HEARRON: Yeah.

14 CHIEF JUSTICE ROBERTS: Justice
15 Gorsuch?

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

22 MR. HEARRON: Not to this extent,
23 yeah, but there may --

24 JUSTICE GORSUCH: But do you agree
25 that there are laws -- defamation laws, gun

1 control laws, rules during the pandemic about
2 the exercise of religion -- that discourage and
3 chill the exercise of constitutionally protected
4 liberties?

5 MR. HEARRON: Yes.

6 JUSTICE GORSUCH: And that they can
7 only be challenged after the fact?

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

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

14 MR. HEARRON: That's probably correct.

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

18 MR. HEARRON: Yes.

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

24 MR. HEARRON: I think that it is -- it
25 would go most of the -- of the way to getting

1 the relief that -- that we need in order for
2 abortion providers to begin providing again. We
3 -- we do think that it is also appropriate for a
4 declaratory judgment against the judges, but I
5 think that the clerks -- that relief --

6 JUSTICE GORSUCH: Okay.

7 MR. HEARRON: -- against the clerks
8 would --

9 JUSTICE GORSUCH: So if that --

10 MR. HEARRON: -- be sufficient.

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

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

22 JUSTICE GORSUCH: But that's pursuant
23 to an -- a judicial order?

24 MR. HEARRON: Yes.

25 JUSTICE GORSUCH: But, otherwise,

1 they're obliged to file everything that comes
2 their way?

3 MR. HEARRON: Yes.

4 JUSTICE GORSUCH: Okay. And so --

5 MR. HEARRON: And -- and -- and that's
6 --

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

10 MR. HEARRON: Yes, we believe so, Your
11 Honor.

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

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

25 JUSTICE GORSUCH: Including

1 constitutional ones?

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

6 JUSTICE GORSUCH: Exactly.

7 MR. HEARRON: -- but I --

8 JUSTICE GORSUCH: But you'd enjoin
9 them anyway?

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

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

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

22 JUSTICE GORSUCH: But subject to those
23 due process standards?

24 MR. HEARRON: Subject to those
25 standards, but I think that those would be

1 extremely difficult --

2 JUSTICE GORSUCH: Thank you.

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

7 CHIEF JUSTICE ROBERTS: Justice
8 Kavanaugh.

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

13 MR. HEARRON: Yes.

14 JUSTICE KAVANAUGH: -- and the class
15 certification. Is that accurate?

16 MR. HEARRON: Yes.

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

24 And if I'm understanding you
25 correctly, you're saying that Ex parte Young

1 principle should apply to both, but the
2 adverseness issue may be more serious with
3 judges, and, therefore, you focused on the
4 clerks. Is that -- that's how I read your reply
5 brief because it was noticeable to me.

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

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

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

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

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

18 JUSTICE KAVANAUGH: Thank you.

19 CHIEF JUSTICE ROBERTS: Justice
20 Barrett?

21 JUSTICE BARRETT: No.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 General Stone.

25 ORAL ARGUMENT OF JUDD E. STONE, II,

1 ON BEHALF OF THE RESPONDENTS

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

4 Petitioners' pursuit of an injunction
5 suffers from two fundamental problems.

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

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

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

22 Petitioners then turned to state court
23 judges and state court clerks and, apparently,
24 in this Court, now narrow their focus to state
25 court clerks. But even they don't suggest that

1 either judges or clerks act unlawfully in the
2 ordinary course by adjudicating a case or
3 receiving a complaint. So Petitioners' harms
4 are not fairly traceable to any unlawfully -- to
5 any allegedly unlawful behavior by state court
6 judges or clerks.

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

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

22 I welcome the Court's questions.

23 JUSTICE THOMAS: Mr. Stone, the -- why
24 wouldn't you consider the S.B. 8 plaintiffs to
25 be sort of private attorneys general? If the

1 attorney general or other state officials don't
2 enforce the law, would it be that unusual to
3 consider them as acting in concert with the
4 state to enforce a state-preferred policy?

5 MR. STONE: Two points, Your Honor.

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

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

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

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

23 MR. STONE: One example could be akin
24 to the injury suffered in the tort of outrage,
25 where an individual becomes aware of a

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

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

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

23 MR. STONE: Well, the injury would be
24 akin to the one suffered in a tort of outrage,
25 where a person witnesses something they

1 essentially find to be so extreme and outrageous
2 it causes them extreme moral or -- or otherwise
3 psychological harm. That's how it works --

4 JUSTICE THOMAS: Give me an example of
5 that.

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

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

25 JUSTICE THOMAS: Thank you.

1 CHIEF JUSTICE ROBERTS: A --

2 JUSTICE BREYER: I would like a -- oh,
3 go ahead.

4 CHIEF JUSTICE ROBERTS: I was just
5 going to ask, assume that the bounty is not
6 \$10,000 but a million dollars. Do you think in
7 that case the chill on the conduct at issue here
8 would be sufficient to allow federal court
9 review prior to the end of the state court
10 process?

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

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

25 And you're saying that somebody is

1 going to undertake that activity even though
2 they're going to be subject to suit for a
3 million dollars repetitively because it doesn't
4 exercise a chilling effect?

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

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

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

21 But even if the -- the -- the amount
22 of the sanction, again, I agree with you, a
23 million dollars would be tremendous, we could
24 increase it further, no number would suddenly
25 cause the federal courts to become more open.

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

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

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

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

22 MR. STONE: Of course, Mr. Chief
23 Justice. But, nonetheless, an individual facing
24 extreme sanctions still nonetheless often has to
25 go through state court systems to vindicate

1 their -- their federal rights.

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

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

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

17 MR. STONE: It's not, Your Honor.
18 And, undoubtedly, there are a variety of
19 individual -- a handful of individual procedural
20 rules inherent to S.B. 8 that are designed to
21 favor this cause of action, the same way that
22 there are some designed to favor causes of
23 action like bringing a suit under the antitrust
24 laws or under 1983.

25 Happy to stipulate to that. But

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

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

19 It would obviously be a question of
20 Texas law in the event that this Court
21 interceded in essentially the post --

22 JUSTICE BREYER: Can I go back for a
23 second from -- to -- from detail to the sort of
24 general -- bigger picture, which stuck in my
25 mind when I read all this road -- you know,

1 roadmap. That should call up a lot of arguments
2 in the briefs. And I thought of Holmes.

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

9 MR. STONE: Of course, Justice.

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

18 Now Holmes was on the Court for Ex
19 parte Young. That Court said: "To await
20 proceedings against the company" -- which is the
21 equivalent of the clinics and the women here --
22 "in a state court and then obtain review in this
23 Court would place the company" -- i.e., women
24 and clinics -- "in peril of large risk and its
25 agents in great risk of fine and imprisonment"

1 -- which you've just heard, the equivalent --
2 "this risk, the company, ought not to be
3 required to take."

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

10 MR. STONE: Two points, Justice
11 Breyer, the latter being what you're describing
12 would be something of an expansion of Ex parte
13 Young, as I think even my friends on the other
14 side concede.

15 As this Court noted, that an
16 injunction against the courts themselves through
17 the Ex parte Young device would have been a
18 violation of our whole scheme of government.

19 Well, this Court in Grupo Mexicano
20 said, specifically speaking about an expansion
21 from a post -- a post-judgment creditor's
22 ability to distraint a debtor's assets, moving
23 to a pre-judgment creditor's ability to do so,
24 that was simply too great of a novel equitable
25 innovation for this Court to be able to permit

1 itself to essentially innovate.

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

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

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

25 MR. STONE: Let me speak to the latter

1 point that you're raising, Justice Kagan, first,
2 and then turning back to the Ex parte one --
3 Young one.

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

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

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

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

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

25 JUSTICE BARRETT: Well --

1 MR. STONE: And --

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

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

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

23 JUSTICE BARRETT: Aren't personal
24 constitutional rights not third-party rights and
25 so the clinic's personal rights would differ

1 from the rights of the woman who's the rights
2 holder?

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

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

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

24 What can't occur is what couldn't
25 occur in, for example, New York Times versus

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

10 JUSTICE KAVANAUGH: General -- General
11 Stone?

12 MR. STONE: Yes, Justice --

13 JUSTICE KAVANAUGH: Sorry. Keep
14 going. Keep going.

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

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

25 In other words, that was an extension

1 of preexisting doctrine to recognize a problem
2 that the Chief Justice was identifying with
3 deprivation of constitutional rights and
4 chilling on the ability to get judicial review.

5 So Ex parte Young sets out this
6 principle that you can get pre-enforcement
7 review in federal court against state
8 enforcement of laws that are assertedly
9 unconstitutional. And 999 times out of 1,000 or
10 maybe every time until this case, that's a state
11 executive official. It's a pro forma exercise
12 usually to identify the state executive
13 official.

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

1 MR. STONE: Two points, Your Honor.

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

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

16 JUSTICE KAVANAUGH: Do you --

17 MR. STONE: -- is something entirely
18 foreign in a traditional way.

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

22 MR. STONE: State action in the sense
23 of the -- of the Fourteenth Amendment perhaps?

24 JUSTICE KAVANAUGH: Yes.

25 MR. STONE: I suppose that a -- a

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

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

19 JUSTICE KAVANAUGH: Well, I think the
20 theory is that the enforcement of the law is
21 adverse to the -- to the plaintiffs' interests
22 and causes injury, and this state official,
23 let's say the clerk, is part of the -- within
24 the chain of state officials who have some
25 connection, which is the language from Ex parte

1 Young, some connection to enforcement of the
2 law.

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

11 JUSTICE SOTOMAYOR: So can --

12 MR. STONE: -- bringing litigation.

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

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

1 enforce Texas law.

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

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

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

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

24 JUSTICE SOTOMAYOR: Assume I disagree,
25 because you didn't answer to my satisfaction

1 Justice Thomas's point that I've never seen a
2 tort that doesn't give you redress for your
3 harm; it gives you redress for bringing the
4 suit, a bounty. And whether you need to prove
5 injury for standing is irrelevant to what
6 qualifies you for the bounty, which is injury
7 doesn't qualify you for that. Just bringing the
8 suit does.

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

17 JUSTICE SOTOMAYOR: You don't
18 understand the --

19 MR. STONE: But --

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

23 MR. STONE: The attorney --

24 JUSTICE SOTOMAYOR: Not the whole,
25 because the state has chosen to deputize an

1 entire swath of citizenry to do that for it, but
2 it retains some direct and indirect enforcement
3 power.

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

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

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

23 MR. STONE: If the -- if the attorney
24 general were the one charged to sue, I would
25 assume so.

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

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

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

19 MR. STONE: It would depend on whether
20 or not it was charged by the attorney general's
21 office to sue or by county DAs, who are not
22 elected by -- who are not elected -- or
23 essentially not accountable to the attorney
24 general in any way. But let's -- if I may
25 modify your hypo a little bit and say that the

1 office of the attorney general --

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

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

21 The -- the reason that we're sort
22 of -- the hypos that I'm -- I'm pushing back
23 against here are that the United -- that the
24 attorney general simply doesn't have any control
25 of the procession of S.B. 8 lawsuits in any way.

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

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

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

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

25 This is just a matter that can also be

1 resolved in the district court if it gets that
2 far. We're not being approached by directing
3 anyone else's litigation. It's individual
4 people who are choosing to bring or not bring
5 these preenforcement challenges in state court,
6 at least.

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

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

21 Your response?

22 MR. STONE: Your Honor, in several of
23 those circumstances individuals who are
24 concerned that a lack of immediate
25 preenforcement federal court access would cause

1 them ruinous liability or otherwise suppress
2 their ability to exercise those rights, have
3 turned to Congress and succeeded.

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

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

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

24 Would that kind of law be exempt from
25 preenforcement review in federal court?

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

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

10 MR. STONE: Yes, but I would add one
11 more point, Your Honor.

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

20 MR. STONE: Again, Your Honor, what
21 we'd have to have, for example, is -

22 JUSTICE KAVANAUGH: Is that a --

23 MR. STONE: -- specifically --

24 JUSTICE KAVANAUGH: -- yes? Or --

25 MR. STONE: Yes, I'm sorry, Your

1 Honor. Yes, it is.

2 JUSTICE KAVANAUGH: That's a yes,
3 that's exempt from preenforcement review?

4 MR. STONE: In the sense that federal
5 courts' doctrines and Congress' statutes
6 defining jurisdiction of the federal courts,
7 would have to be on -- would have to be modified
8 by Congress.

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

16 MR. STONE: Respectfully, Your Honor,
17 the answer to that in both part of Justice
18 Kavanaugh's question, is that just as in the
19 other circumstance -- just as I am asking for
20 here for Texas state court judges, we have to
21 assume that other state courts' judges are, in
22 fact, going to faithfully apply the
23 Constitution, its rights, and this Court's
24 decisions.

25 It will have to occur through the

1 state court process to be sure, but that is an
2 adequate substitute and adequate venue --

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

9 CHIEF JUSTICE ROBERTS: Please.

10 MR. STONE: Thank you. No doubt
11 that's the case in many kinds of lawsuits,
12 including constitutional ones, Your Honor, but
13 no one has thought that litigation delays had
14 constitutional dimension for purposes of
15 expanding access to the federal courts before.

16 I don't think this case should be the
17 first one to start.

18 CHIEF JUSTICE ROBERTS: Thank you,
19 General Stone. I have just one additional
20 question.

21 There was a statement in one of the
22 briefs filed below, not -- not by you, that said
23 "states have every prerogative to adopt
24 interpretations of the Constitution that differ
25 from the Supreme Court's."

1 Does the State of Texas have a
2 position on that?

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

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Justice Thomas?

16 JUSTICE THOMAS: No questions.

17 CHIEF JUSTICE ROBERTS: Justice
18 Breyer?

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

25 The attorney general didn't have any

1 direct power. He just had a kind of residual
2 power.

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

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

14 So is there a difference I overlooked?

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

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

24 CHIEF JUSTICE ROBERTS: Justice Alito?

25 JUSTICE ALITO: What can you tell us

1 about the state multi-district litigation? When
2 were -- this law was enacted, I believe, in the
3 middle of May.

4 When were those suits filed? Where do
5 they stand now? Are they being delayed as a
6 result of the federal court litigation? How
7 quickly might we expect to see a decision in
8 that case?

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

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

23 JUSTICE ALITO: They were filed around
24 the time when S.B. 8 took effect, or around the
25 time when it was enacted back in May?

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

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

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

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

15 MR. STONE: That's incorrect, Your
16 Honor. At least one of the litigants is
17 Planned Parenthood where they have raised
18 explicitly the federal constitutional undue
19 burden defense. So I know at least in that one.
20 I couldn't swear to each of the others.

21 But I know in that one they are
22 certainly explicitly raising this Court's
23 articulation of the Casey right.

24 JUSTICE ALITO: Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Sotomayor?

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

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

11 Now, I take and I listen to what Ex
12 parte Young said about not interfering with the
13 work of the coordinate branches, ongoing work of
14 the coordinate branches, but one thing that we
15 said in Cooper versus Aaron was equally
16 important and, that is, constitutional rights
17 declared by this Court can neither be nullified
18 openly and directly by state legislatures or
19 state executive or judicial officers.

20 And these are the key words, "nor
21 indirectly through evasive schemes." So given
22 what I just said, that that principle is
23 inherent in the Constitution, why am I limited
24 by Grupo Mexicano? Why would I be looking to a
25 history that can't exist by its very nature?

1 What does exist are the words we said in Ex
2 parte Young, which was we are charged by
3 Congress in ensuring that federal rights are
4 respected directly or indirectly.

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

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

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

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

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

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

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

19 JUSTICE GORSUCH: So there is a --

20 MR. STONE: -- right now against
21 private --

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

24 MR. STONE: Right now, yes.

25 JUSTICE GORSUCH: And there is nothing

1 to prohibit them from bringing one?

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

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

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

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

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

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

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

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

23 JUSTICE GORSUCH: Thank you.

24 CHIEF JUSTICE ROBERTS: Justice --
25 Justice Barrett?

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

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

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

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

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

10 JUSTICE BARRETT: For that one
11 abortion --

12 MR. STONE: That softens some of that
13 effect.

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

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

25 MR. STONE: That --

1 JUSTICE BARRETT: They're just on an
2 individual-by-individual basis?

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

8 JUSTICE BARRETT: You've answered my
9 question. Thanks.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Rebuttal, Mr. Hearron.

13 REBUTTAL ARGUMENT OF MARC A. HEARRON
14 ON BEHALF OF THE PETITIONERS

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

22 And, in fact, the -- the defendants
23 there were acting strategically in order to
24 preclude any broader review. They have now
25 stipulated to temporary injunctions in order to

1 -- to prevent an injunction that might then get
2 appealed and get broader relief from the higher
3 courts.

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

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

1 to deal with.

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

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

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

24 Every single person, and that's
25 exactly what this Court addressed in Ex parte

1 Young. Ex parte Young and the reason the
2 principles underlying Ex parte Young support
3 relief here is one of the things that it said is
4 that -- that the railroad may not be able to
5 find an agent or an employee even willing to
6 violate the law to -- to generate a test case.

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

12 CHIEF JUSTICE ROBERTS: Thank you,
13 counsel.

14 The case is submitted.

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

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