

1 IN THE SUPREME COURT OF THE UNITED STATES
2 - - - - -X
3 LINDA FREW, ON BEHALF OF HER :
4 DAUGHTER, CARLA FREW, ET AL. , :
5 Petitioners :
6 v. : No. 02-628
7 ALBERT HAWKINS, COMMISSIONER, :
8 TEXAS HEALTH AND HUMAN :
9 SERVICES COMMISSION, ET AL. , :
10 - - - - -X
11 Washington, D. C.
12 Tuesday, October 7, 2003
13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States at
15 10:02 a.m.
16 APPEARANCES:
17 SUSAN F. ZINN, ESQ., San Antonio, Texas; on behalf of the
18 Petitioners.
19 IRVING L. GORNSTEIN, ESQ., Assistant to the Solicitor
20 General, Department of Justice, Washington, D.C.; on
21 behalf of the United States, as amicus curiae,
22 supporting the Petitioners.
23 R. EDWARD CRUZ, ESQ., Austin, Texas; on behalf of the
24 Respondents.
25

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5	IRVING L. GORNSTEIN, ESQ.	
6	On behalf of the United States,	
7	as amicus curiae, supporting the Petitioners	16
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11	SUSAN F. ZINN, ESQ.	
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P R O C E E D I N G S

(10:02 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument
now in No. 02-628, Linda Frew v. Albert Hawkins.

Ms. Zinn.

ORAL ARGUMENT OF SUSAN F. ZINN
ON BEHALF OF THE PETITIONERS

MS. ZINN: Thank you, Mr. Chief Justice, and may
it please the Court:

Sovereign immunity should not bar enforcement of
the consent decree in this case for two reasons.

First, when State officials ask a district court
to enter a consent decree, they submit their rights
concerning the decree for judicial determination, thereby
waiving any possible claim for objection on the basis of
immunity.

Second, the decree in this case provides
prospective relief to protect the supremacy of Federal
law, exactly as envisioned by Ex Parte Young.

QUESTION: May I ask on -- on the first point?
You say when State officials submit to -- to a decree.
It's -- it's immaterial, as far as you're concerned,
whether the State Attorney General defended the -- the
suit or represented these officials. Is that right?

MS. ZINN: No, it's not immaterial. The --

1 Texas' Attorney General is authorized by the legislature
2 to represent the State and its employees --

3 QUESTION: No. I understand that, but suppose
4 he hadn't been and suppose it is just the State officials
5 who appeared in an Ex Parte Young suit. They're --
6 they're sued. There's no other State official who takes
7 part in the proceedings. Nonetheless, they enter into a
8 consent decree. Is it your submission that even without
9 any other participation by anybody else in the State, that
10 consent decree binds not just them, but I gather you say
11 future officials in -- in their offices? Right?

12 MS. ZINN: Unrepresented by the State Attorney
13 General.

14 QUESTION: Unrepresented. You would --

15 QUESTION: Well, but wouldn't -- wouldn't there
16 be a question of fact in that case? I mean, it would be
17 odd, I -- I would suppose not to have the State Attorney
18 General there, and -- and wouldn't the -- if I were a
19 trial judge, I'd say, well, is this the State that is
20 submitting this -- this settlement? I mean, wouldn't --
21 wouldn't there be, theoretically at least, a fact question
22 in Justice Scalia's circumstances?

23 MS. ZINN: Fact and a matter of law, Your Honor.
24 The question under this Court's decision recently in
25 Lapidés would be whether those officials are authorized to

1 represent the State in court, even absent their attorney.
2 That would be so unusual in Texas I can't imagine it even
3 happening, but --

4 QUESTION: No, but that -- but that's a waiver
5 theory. I mean, if you're proceeding on a waiver theory,
6 you -- you need the State there.

7 But let's assume you're not proceeding on the
8 waiver theory. You have the second ground, which is just
9 if you have authority to enter the decree, you have
10 authority to enforce the decree. Now, for purpose of that
11 argument, does it make any difference to you whether the
12 State Attorney General is there or whether these officials
13 have the power to represent the State?

14 MS. ZINN: Under our second argument, our
15 position is that since the decree is a remedy ordered in a
16 valid Ex Parte Young case, it provides prospective relief
17 only from alleged ongoing violations of Federal law. The
18 -- the remedy is proper.

19 QUESTION: And therefore it's consistent with
20 the Eleventh Amendment without any waiver.

21 MS. ZINN: Correct. The Eleventh Amendment is
22 not engaged for that -- for that --

23 QUESTION: Can you tell us how it worked? The
24 representative of the Attorney General was in court and he
25 stands up and he says, we insist on sovereign immunity,

1 and the judge say, all right, that's act one. It's
2 closed. And then did the same officials stay and they
3 say, well, now we're here on the Eleventh Amendment? I
4 mean, how -- how did this work? And --

5 MS. ZINN: In -- in this case --

6 QUESTION: And let -- let me just say also
7 there's no excerpt of record or docket entry. The only
8 thing I have is the consent decree. Was there any order
9 saying the consent decree dated so and so is hereby
10 entered as the judgment of the court? I mean, can I find
11 that anywhere?

12 MS. ZINN: Yes, Your Honor. The -- the lodging
13 has the -- as its last page, the order to correct the
14 consent decree which states that the -- the order was --
15 the unopposed motion to -- to correct the consent decree
16 has merit and should be granted. The decree was entered
17 as the court's order in February of 1996.

18 QUESTION: And --

19 QUESTION: There was no separate order. It was
20 just this consent decree that's in the lodging. That's --

21 MS. ZINN: That's correct.

22 QUESTION: -- that's it.

23 MS. ZINN: That's correct.

24 QUESTION: Okay. Now maybe we can go back and
25 you can tell me who the -- was there an act one and an act

1 two, act one being the State asserts immunity, act two
2 being the Eleventh Amendment, or -- or were the same
3 parties before the court at all times?

4 MS. ZINN: The same parties --

5 QUESTION: Wearing different -- wearing
6 different hats or proceeding under some different theory.

7 MS. ZINN: The same parties were before the
8 Court for the entire case with the exception of two State
9 agencies which were dismissed early on.

10 QUESTION: Right.

11 QUESTION: That's the puzzle in this case. The
12 State as State was dismissed at the threshold, and then we
13 have an Ex Parte Young case. And now we're talking about
14 Eleventh Amendment immunity again. So the State is out of
15 the case. It's proceeding as an Ex Parte Young case. How
16 did it then become converted back into a case against the
17 State so that we're talking about whether the State waived
18 its immunity?

19 MS. ZINN: Yes, Justice Ginsburg. Our position,
20 as well recognized apparently, is that this is an Ex Parte
21 Young case. However, the State officials in their
22 briefing have urged that that is not correct and that this
23 -- this, at least in part, is not a valid order under Ex
24 Parte Young.

25 QUESTION: The State, if -- if I remember

1 correctly, came before the judge and urged the approval of
2 this consent decree.

3 MS. ZINN: Correct.

4 QUESTION: Did it not? And there were -- there
5 were several representatives of the State who so
6 testified.

7 MS. ZINN: Correct, and they were unanimous.
8 The -- all of the State officials and their lawyer were
9 unanimous in requesting the district court to enter the
10 consent decree.

11 QUESTION: That -- that's your waiver. That's
12 the waiver side of your argument.

13 MS. ZINN: Correct.

14 QUESTION: I frankly am reluctant to -- to
15 decide the case on that ground if another ground is
16 available simply because that would require a case-by-case
17 investigation as to -- to what extent the participation by
18 -- by other State officials existed, whether they were
19 authorized to participate and so forth and so on.
20 Whereas, your other ground doesn't require that -- that
21 case-by-case investigation, and wouldn't that be a -- a
22 much clearer line to -- to establish?

23 MS. ZINN: In our -- in our view both positions
24 are clear in this case. The -- the --

25 QUESTION: You have to make sure that the State

1 Attorney General was authorized to represent the State in
2 this case or whatever other official you say committed the
3 waiver. That would -- that would be a factual
4 investigation in every case, wouldn't it?

5 MS. ZINN: No. In Lapidés, it appeared to -- to
6 be a question of law. The issue --

7 QUESTION: No, but Justice Scalia's question
8 didn't go to waiver. It went to representation. And
9 Lapidés says, if you can represent, you can waive. But
10 there would be a question of representation, wouldn't
11 there?

12 MS. ZINN: But in Lapidés, it appeared to me
13 that that was resolved fairly simply based on the
14 application of Federal law to the State --

15 QUESTION: Once -- once it was understood that
16 he could represent.

17 MS. ZINN: Yes, which was determined by an
18 examination of the State statutes involved. And the Texas
19 law on that point is almost word for word the same as the
20 -- the Georgia constitutional provisions --

21 QUESTION: Oh, sure. Easy. I mean, I'm -- I'm
22 not saying that this would be a difficult case, but you
23 would have to, I suppose, make that inquiry.

24 MS. ZINN: But --

25 QUESTION: This case might not be difficult, but

1 I -- I don't like going rummaging around in State law. I
2 find Federal law hard enough.

3 (Laughter.)

4 MS. ZINN: I do too, Your Honor.

5 QUESTION: Ms. Zinn, I thought that you said in
6 response to my question that this -- this waiver -- that's
7 not your preferred ground. You said you're arguing it
8 because the State insisted that this was Eleventh
9 Amendment and it wasn't waived. But your -- you brought
10 an Ex Parte Young suit. You've got a consent decree under
11 that heading, and -- and that argument, if it prevails,
12 would be -- one would not need to reach the question of
13 the Eleventh Amendment in the --.

14 MS. ZINN: That's correct. The --, one way to
15 look at this is that given the Texas Attorney General's
16 argument that this is not an Ex Parte Young case, not a
17 valid order under Ex Parte Young, to the extent that the
18 Court agrees with that, those points have been waived
19 because by asking the district court to enter the consent
20 decree, the State officials submitted their rights
21 concerning the decree for judicial determination. And by
22 doing that --

23 QUESTION: Let's put -- put it this way. Are
24 you saying that if the State officials negotiate a consent
25 decree that goes beyond the Eleventh Amendment -- or that

1 goes beyond -- pardon me -- that goes beyond Ex Parte
2 Young's --

3 MS. ZINN: Yes.

4 QUESTION: -- rules, that then there must be a
5 waiver?

6 MS. ZINN: No.

7 QUESTION: All right. How can they do that
8 without a waiver?

9 MS. ZINN: Well --

10 QUESTION: Especially if they've asserted their
11 immunity at the beginning.

12 MS. ZINN: Because under this Court's
13 traditional rules concerning equitable decrees, even a
14 disputed injunction need not be specifically tied to the
15 provisions of law for the --

16 QUESTION: So you want us to write an opinion
17 that says after the State has specifically asserted its
18 Eleventh Amendment immunity, its officials may negotiate a
19 consent decree which goes beyond the boundaries of
20 jurisdiction set forth in -- in Ex Parte Young without
21 waiver.

22 MS. ZINN: The question of the scope of remedy
23 is a different question from the Eleventh Amendment/Ex
24 Parte Young question. The Ex Parte Young question is a
25 jurisdictional question, but the question of the scope of

1 proper remedy --

2 QUESTION: Well -- well, you introduced the
3 point of remedy. That wasn't part of my question. My --
4 my question was whether or not, having asserted the
5 immunity in a -- in -- under the assumption that the
6 immunity has not been waived, the State officials can
7 negotiate a consent decree that goes beyond the usual
8 rules of Ex Parte Young, it goes beyond the authority
9 granted to the courts under Ex Parte Young, without
10 relying on the theory of waiver.

11 MS. ZINN: For example, damages? Would that fit
12 within your hypothetical? Because in that case without
13 waiver, no.

14 QUESTION: You -- you really can't tell until
15 the decree is entered whether or not it complies with Ex
16 Parte Young, I would think, because it isn't necessarily
17 fought out on the -- in the -- in the trial of the case
18 exactly what the remedy will be.

19 MS. ZINN: The -- the validity of consent decree
20 should be -- as in an Ex Parte Young case, should be
21 measured under this -- this Court's decisions, for
22 example, in Milliken and Rufo. Milliken says that the
23 remedy must tend to or to remedy the violation proven.
24 And Rufo says that when you have a consent decree, it may
25 aim even higher than that. Because in the course of --

1 QUESTION: But maybe -- maybe there should be a
2 special rule for Ex Parte Young cases. In the ordinary
3 case, going beyond the mere violation does not offend any
4 other provision of the Constitution, but the argument here
5 is, oh, once you go beyond holding the officer to
6 compliance with Federal law, once you go beyond that,
7 you're out of Ex Parte Young and you're moving against the
8 State and the Eleventh Amendment is a bar. So maybe
9 there's a special rule with regard to remediation in -- in
10 Ex Parte Young cases.

11 MS. ZINN: Milliken involved a State official,
12 and it's one of the key cases about the scope of disputed
13 injunctions. And it says that remedial orders may go
14 beyond the exact scope, the precise scope of the violation
15 at issue.

16 QUESTION: Is this outside of Ex Parte Young? I
17 -- I mean, the way I was thinking about it, which might
18 not be right, is that what you were saying in the second
19 part of your argument is that Ex Parte Young permits,
20 without the consent of a State, an individual to sue a
21 State official in his official capacity, asking for an
22 injunction on the ground that the official has violated
23 Federal law. That's what Ex Parte Young says.

24 MS. ZINN: Correct.

25 QUESTION: And now you get that injunction, and

1 that injunction contains provisions that aren't all about
2 Federal law. Some of them are about related State law.
3 And I thought perhaps the way to look at it was, and that
4 injunction does not violate the Eighth -- the Eleventh
5 Amendment. You don't need a State to give consent because
6 it's all part of an effort to cure the Federal violation
7 with related matters thrown in.

8 MS. ZINN: Correct.

9 QUESTION: Ex Parte Young authorizes such a
10 thing.

11 MS. ZINN: Correct.

12 QUESTION: Now, is that last statement right?

13 MS. ZINN: Yes.

14 QUESTION: So then it's not outside Ex Parte
15 Young. You're giving us an interpretation of what Ex
16 Parte Young means.

17 MS. ZINN: Yes.

18 QUESTION: And what is your authority for saying
19 that Ex Parte Young validates the going beyond the Federal
20 issues involved? You mentioned Milliken. Is that -- is
21 that authority for that?

22 MS. ZINN: Milliken. Hutto v. Finney would be
23 another example. A district court need not sit back and
24 hope that the State officials will comply with its proper
25 remedial order. It can enforce that order.

1 QUESTION: Well, I'm not talking so much about
2 enforcement as about entering it in the first place
3 consistently with Ex Parte Young.

4 MS. ZINN: Well, this Court's decision in
5 Firefighters generally sets out standards for entry of a
6 consent decree, and a decree is properly entered, as this
7 one was found to be, if it furthers -- if it serves to
8 resolve a dispute within the court's subject matter
9 jurisdiction, which is the case here -- this is a Federal
10 question about the Medicaid Act -- if it is generally
11 within the scope of the pleadings, which is true in this
12 case, and if the remedy in the decree serves to further
13 the objectives of the -- in this case, the Medicaid Act,
14 which is true about all of the provisions of the decree in
15 this case.

16 QUESTION: So you're really saying that it
17 doesn't go beyond Ex Parte Young. I mean, the -- the
18 premises of some of the arguments here that it does go
19 beyond it, in your judgment, is -- is in fact a false
20 premise.

21 MS. ZINN: That's correct. Our position is that
22 the district court could have entered this -- this decree
23 as a disputed injunction if the State officials had not
24 decided to consent.

25 QUESTION: When you had --

1 QUESTION: Would you help -- excuse me. May I
2 ask one more question?

3 Would you help me on one thing? My
4 understanding was -- and I -- I may simply be wrong on
5 this. My understanding was that the claim that this went
6 beyond Young was not a claim that it -- it mandated State
7 law -- or mandated the performance of State law
8 obligations, but that it went further than it had to to
9 enjoin the Federal violation by getting into details about
10 what the State officers had to do or had to refrain from
11 do -- from doing. Am I correct that it's -- it's not --
12 the claim is not that it got into State law but that it
13 simply went beyond the scope of a proper remedial order
14 under the Federal law? Is that correct?

15 MS. ZINN: Well, I'd hate to put words into Mr.
16 Cruz's mouth.

17 QUESTION: I know. I should be asking --

18 MS. ZINN: But I believe that is part of their
19 claim

20 QUESTION: Okay.

21 MS. ZINN: May I reserve the rest of my time?

22 QUESTION: Very well, Ms. Zinn.

23 Mr. Gornstein, we'll hear from you.

24 ORAL ARGUMENT OF IRVING L. GORNSTEIN,

25 ON BEHALF OF THE UNITED STATES,

1 AS AMICUS CURIAE, SUPPORTING THE PETITIONERS

2 MR. GORNSTEIN: Mr. Chief Justice, and may it
3 please the Court:

4 Enforcement of the decree in this case does not
5 violate the Eleventh Amendment for two reasons. First,
6 any Eleventh Amendment objection was waived, and second,
7 enforcement is permissible under Ex Parte Young.

8 Now, the waiver issue arises in this case
9 because the State officials are arguing that the relief in
10 the consent decree that is directed to them violates the
11 Eleventh Amendment, and it is that Eleventh Amendment
12 objection that those same officials, together with the
13 Attorney General, waived when they asked the district
14 court to enter the very relief that they are now objecting
15 to on Eleventh Amendment grounds.

16 And the reason that there is waiver is that
17 under this Court's cases, when the Attorney General on the
18 -- of the State on behalf of the State invokes a Federal
19 court's jurisdiction, Eleventh Amendment immunity is
20 waived. Now, when the Attorney General in this case
21 entered into a consent decree on behalf of State officials
22 in their official capacity and then asked the district
23 court to enter that decree, he clearly invoked that
24 court's jurisdiction and waived any Eleventh Amendment
25 objection to the entry of that judgment against those

1 State officials.

2 QUESTION: Suppose the Attorney General had not
3 been involved and simply the State officials on their own
4 entered into this consent decree.

5 MR. GORNSTEIN: First of all, you would have the
6 question of waiver, and that is answered by the inquiry
7 that Lapedes and other waiver cases have -- have
8 instructed, which is do those -- are those officials
9 authorized by State law to conduct litigation on behalf of
10 the State.

11 QUESTION: So that would be a factual inquiry in
12 every case whether the particular official --

13 MR. GORNSTEIN: Well, I would say -- I would say
14 it's a legal question --

15 QUESTION: I understand.

16 MR. GORNSTEIN: -- that typically in almost
17 every State, Justice Scalia, it would be the Attorney
18 General who is authorized to represent the State in
19 litigation.

20 QUESTION: Well, Justice Scalia can preserve his
21 own hypothetical.

22 MR. GORNSTEIN: Right.

23 QUESTION: But suppose that there was -- that
24 the officials did not have the authority to waive the
25 Eleventh Amendment, but they did enter into a consent

1 decree.

2 MR. GORNSTEIN: Yes. Then you get to the second
3 argument in this case which is an Ex Parte Young argument,
4 and the Ex Parte Young issue is that the consent decree in
5 this case is permissible under Ex Parte Young because it
6 provides prospective relief against State officials based
7 on the Federal Medicaid statute. And those are the three
8 requirements of an Ex Parte Young suit, that it be --

9 QUESTION: This -- this carries you so far
10 beyond the theory of Ex Parte Young, and the theory of Ex
11 Parte Young is you're not impinging upon State sovereign
12 immunity when you are simply requiring State officials to
13 adhere to State law. They are acting ultra vires when
14 they're -- when they're violating Federal law, and
15 therefore, you're not impinging upon the State's sovereign
16 immunity.

17 But now with the theory that you're expounding,
18 you're not only holding them to compliance with Federal
19 law, but you're saying even when you're not acting ultra
20 vires, when you have a lot of perfectly legal options of
21 how to comply with Federal law, you will -- you will
22 choose this option. And that -- that is, it seems to me,
23 impinging upon State sovereign immunity in -- in a way
24 that -- that the mere theory of Ex Parte Young does not
25 justify.

1 MR. GORNSTEIN: In an Ex Parte Young action,
2 State officials like all other Federal litigants are free
3 to enter into consent decrees that go beyond what is
4 strictly required by Federal law on one or more issues
5 because there is a tradeoff. They then get less relief or
6 no relief on other issues that they may care about. So
7 this is a system that benefits Federal court litigants
8 generally, and it is also one that benefits the State and
9 its State officials.

10 QUESTION: I'm not worried about the officials.
11 Yes, the officials get a good deal. They -- they get of
12 the suit. They get a -- a decree. But what about the
13 State who on our -- on our current hypothesis, the State
14 is out of the proceeding. The Attorney General is not
15 there and here are these State officers who are giving
16 away a whole lot of -- of options that the State has, and
17 they're -- they're saying, yes, bind the State even though
18 the suit is just against me.

19 MR. GORNSTEIN: First of all, we -- we presume
20 -- this Court presumes that State officials, when they act
21 in their official capacity, are acting in good faith to
22 implement the best interests of the State.

23 Second of all, the State does benefit when its
24 officials can enter into decrees that --

25 QUESTION: Mr. Gornstein, is -- is taking the

1 Attorney General out of it kind of a hypothetical
2 question? Do you know of any institutional decree,
3 whether it involves schools, prisons, the Medicaid program
4 which the State Attorney General isn't there?

5 MR. GORNSTEIN: I don't know of any such case,
6 and as I was telling Justice Scalia before, all the
7 Court's waiver cases up until now have been ones in which
8 the Attorney General has represented the State and has
9 waived the -- has -- has been authorized by the State to
10 represent the State's interests in litigation.

11 QUESTION: Might be improper for -- for the --
12 for the trial court to go beyond strict compliance with
13 Federal law, to -- to approve a consent decree that goes
14 beyond that without the presence of the -- I mean, maybe
15 waiver is a necessary concomitant of -- of the theory of
16 Ex Parte Young that you're giving us.

17 MR. GORNSTEIN: No, I don't think it -- it is a
18 necessary -- waiver is not a necessary concomitant because
19 it is a component of an Ex Parte Young case. This Court
20 said, for example, in the Rufo case that State -- it had
21 no doubt that State and local officials, in order to
22 resolve litigation, could agree to relief that goes beyond
23 what's required by Federal law.

24 QUESTION: Mr. Gornstein, I want to clarify what
25 you mean in your argument when you say go beyond. There

1 are -- and here are two possibilities.

2 One, you throw in an entirely new obligation,
3 and you say, you know, by the way, we'll -- we'll also
4 agree to a program of pediatric podiatry, which isn't
5 covered by the statute. We'll do that too just to show
6 you how good our faith is.

7 A second possibility is we'll show you how we
8 will implement our agreement to abide by what we
9 understand to be Federal law. We will throw in a how-to-
10 do-it or a how-we-are-going-to-do-it clause.

11 I understand your argument, when you refer to
12 going beyond the letter of Federal law and agreeing to
13 that in a settlement, to refer to a how-to-do-it kind of
14 agreement as opposed to a new substantive obligation
15 agreement. I assume. Is that correct?

16 MR. GORNSTEIN: Yes, but let -- let me explain
17 further.

18 QUESTION: I guess my question is --

19 MR. GORNSTEIN: Yes.

20 QUESTION: -- why do you acquiesce in this
21 phrase, going beyond Ex Parte Young? Have you ever --

22 MR. GORNSTEIN: No, I --

23 QUESTION: Has anybody seen a consent decree
24 that simply said, we'll obey the law?

25 MR. GORNSTEIN: No. I didn't say it went beyond

1 Ex Parte Young. I said it went beyond what was strictly
2 required by Federal law. And as this Court said in the
3 Rufo case, every Federal court remedial order that's
4 entered by a Federal court goes beyond what's strictly
5 required by Federal law.

6 QUESTION: That's all --

7 MR. GORNSTEIN: And Milliken permits that as
8 long as it's aimed at remedying a violation.

9 But there's one step beyond Milliken here, and
10 that Rufo says that you can even agree to relief that goes
11 beyond what a court would order after a trial as long as
12 the relief furthers the objectives of the underlying law
13 because there you are operating with the consent of the
14 State officials in -- in selecting that relief.

15 QUESTION: You should have given a different
16 answer to Justice Souter then because certainly pediatric
17 podiatry would further the objectives of the law to
18 provide the medical care to -- to children.

19 MR. GORNSTEIN: Well, at some point it has to
20 resolve a bona fide dispute within the subject matter
21 jurisdiction of the court as well, and if there's no
22 arguable violation of Federal law that the relief relates
23 to, then it falls outside of what a court should enter as
24 a decree under Rufo.

25 QUESTION: Well, you really haven't saved us a

1 whole lot of trouble then. I -- I frankly thought that
2 one of the attractive features of your position was that
3 once you have an order, that's the end of it. You don't
4 have to try the order when -- when you seek enforcement to
5 parse out which parts of it go too far and which parts
6 don't go too far. You tell me there are some -- some that
7 can go too far. We have to look to whether this is
8 pediatric podiatry or -- or not.

9 MR. GORNSTEIN: In general, once a decree has
10 been entered, there's no objection that can be made at the
11 enforcement stage other than subject matter jurisdiction.
12 But subject matter jurisdiction would include an inquiry
13 into whether what was at issue in the case was -- if it
14 was an arguable Federal claim or sought to further the
15 objectives underlying an arguable Federal claim. That's
16 going to be rare that it won't do that, but if it doesn't
17 do that, the State has a right to object to that on
18 subject matter jurisdiction grounds.

19 By the way, the State also has the right always
20 to move for modification of provisions under this Court's
21 decision in Rufo that are not arguably related to -- that
22 are not related to any arguable violation of Federal law.
23 If it's just a frivolous underpinning to the suit, the --
24 the State could always move for modification and get that
25 provision eliminated under Rufo.

1 QUESTION: The Attorney General was involved in
2 the case in Rufo. You said in all of the cases that you
3 know --

4 MR. GORNSTEIN: No, no. I -- no. Rufo itself
5 was a suit against local officials, but what Rufo said is
6 that State and local officials can enter into these --
7 these kinds of agreements and that State officials and
8 local officials could obtain modifications based on
9 changes in circumstances.

10 QUESTION: Thank you, Mr. Gornstein.

11 Mr. Cruz, we'll hear from you.

12 ORAL ARGUMENT OF R. EDWARD CRUZ

13 ON BEHALF OF THE RESPONDENTS

14 MR. CRUZ: Mr. Chief Justice, and may it please
15 the Court:

16 This case presents the basic question whether
17 Federal district courts are immune from the strictures of
18 sovereign immunity and Ex Parte Young when administering
19 Federal consent decrees.

20 In this case, it is clear what Federal law
21 requires. The Medicaid statute is very clear and
22 everything that Federal law requires, the State of Texas
23 is doing.

24 The dispute that the parties are having here is
25 not simply a theoretical dispute about whether -- what

1 degree of connection there should be between a remedy and
2 -- and an ongoing violation of Federal law. There is no
3 violation of Federal law, and that fundamentally is the
4 problem

5 QUESTION: But can I ask you this question? You
6 say there's no violation of Federal law now. Does that
7 mean there was no violation of Federal law when the
8 lawsuit began?

9 MR. CRUZ: It does not necessarily mean that and
10 no court has determined that.

11 QUESTION: No, but isn't it -- isn't the -- in
12 order to determine the court's power to act, don't you
13 have to look at the facts at the time litigation started?

14 MR. CRUZ: Well, under Ex Parte Young, the
15 question is not retrospectively was there a violation of
16 Federal law, but -- but --

17 QUESTION: No. I understand that, but still it
18 seems to me your -- your jurisdictional inquiry would
19 focus on the situation at the time the litigation
20 commenced.

21 MR. CRUZ: There is a strong argument that there
22 was not a violation of Federal law at the time the
23 litigation commenced, but that matter was never
24 adjudicated one way or the other.

25 QUESTION: That's right because the State, in

1 effect, waived its right to adjudicate that.

2 MR. CRUZ: What the State did is pursue an
3 option to settle the -- the matter and avoid an
4 adjudication.

5 QUESTION: But doesn't that mean there was at
6 least a potential violation of law that would give the
7 court jurisdiction to enter a remedy, which might go
8 beyond merely saying, don't violate the law in the future,
9 that because you may have violated the law in the past, I
10 have the power to order you to do some things that may not
11 in themselves be illegal?

12 MR. CRUZ: We would agree that this case was
13 initially properly brought under Ex Parte Young in that
14 the complaint, under the terms of the Verizon decision,
15 alleged a violation of Federal law. However, Ex Parte
16 Young is not simply a formulistic pleading requirement.
17 It also is -- is, under this Court's decision in, among
18 other things, Green v. Mansour, a restriction on the
19 Federal court's jurisdiction that -- that what there would
20 have to be for your hypothetical, Justice Stevens, to
21 carry through is not simply a determination that there
22 might be a violation of Federal law.

23 QUESTION: Well, do you think in order to enter
24 a consent decree, the judge had to adjudicate that there
25 was a violation of Federal law?

1 MR. CRUZ: No, Your Honor. But in order for the
2 court now to exercise the coercive authority of the
3 Federal court and to order the State officials to engage
4 in a very detailed course of conduct, the predicate that
5 justifies the Young fiction in the first place is an
6 ongoing violation of Federal law.

7 QUESTION: So you're -- you're telling us that
8 the effect of this consent decree, what Texas achieved by
9 it, is it comes into court and says, oh, let's -- let's
10 not fight about whether there was a violation or not,
11 we'll accept a consent decree, and the effect of this
12 consent decree is simply we'll fight about this same
13 question later. Right?

14 MR. CRUZ: If the agreement was --,

15 QUESTION: And you haven't given up anything
16 else. You've just said, let's -- let's not fight about
17 this. Why would the other side ever accept such a consent
18 decree? It's crazy.

19 MR. CRUZ: Well --

20 QUESTION: You're just telling them, you know,
21 just dismiss this case, and if you want to get us, bring
22 the same case later. Why would I enter into such a
23 consent decree?

24 MR. CRUZ: The consent decree offered the other
25 side a great deal. For one thing, the State, as a

1 voluntary agreement, agreed to carry out an extensive
2 course of conduct. And if you look at the actual
3 record --

4 QUESTION: Only so long as the State chose to do
5 it because on your theory, you -- you create this oddity.
6 They had power -- the court had power to enter the decree
7 but not to enforce it.

8 Would you take the same position if this had
9 been a litigated judgment and the exact same decree came
10 out at the end of the line? And then the State says,
11 well, this was an Ex Parte Young suit and even though we
12 litigated and lost, we can still say all bets are off
13 because at the enforcement stage, you have to prove the
14 case all over again.

15 Now, are you making a distinction between a
16 consent decree and a litigated judgment, or do you accept
17 that this -- if this case had been litigated and that
18 decree entered, it could be enforced?

19 MR. CRUZ: Justice Ginsburg, we're -- we're
20 making both distinctions. This would be a more difficult
21 case if there had been -- it had been litigated and there
22 had been a determination of a violation of Federal law,
23 but --

24 QUESTION: Why? Why would it be more difficult?
25 It seems to me this is more difficult. You agreed to it.

1 MR. CRUZ: It would be more difficult because
2 you at least had the predicate for Ex Parte Young in the
3 first place. You had a violation of Federal law.

4 QUESTION: Well, but it seems to me that when
5 matters are in doubt and a consent decree is entered,
6 obviously with the consent of both parties -- that's what
7 it means -- that it is a question of Federal law. It's a
8 Federal judgment.

9 MR. CRUZ: It -- it is absolutely a Federal
10 judgment, but on the terms of the consent decree, there
11 was no concession of liability. No court at any time has
12 ever found the State of Texas was violating Federal law.

13 QUESTION: No. But your argument, as I
14 understood it a moment ago, is that you can't go beyond
15 Federal law because there's no violation of Federal law
16 now. And that would be exactly the same whether the
17 predicate was a -- a litigated judgment or a consent
18 decree.

19 MR. CRUZ: In essence --

20 QUESTION: So we're in -- it seems to me you're
21 in the same boat under Justice Ginsburg's hypothetical.

22 MR. CRUZ: The second part of Justice Ginsburg's
23 hypothetical about whether even if this were fully
24 adjudicated, would this content -- consent decree be
25 proper, the answer is plainly no because this consent

1 decree does not enjoin ongoing violations of Federal law.
2 There are a number of provisions in this consent decree --
3 QUESTION: So in other -- I take that to mean,
4 yes, we would be making exactly the same argument --
5 MR. CRUZ: Absolutely.
6 QUESTION: -- if this had been a litigated
7 decree. We would -- we would say that --
8 MR. CRUZ: Absolutely.
9 QUESTION: -- that the order saying, A, you did
10 something wrong, you violated Federal law, and B, in the
11 future to avoid that, you've got to do the following
12 things, A, B, C -- you would say so long as at the moment
13 of enforcement we are not then violating Federal law in
14 the sense found in the judgment, they cannot order A, B,
15 C, and D.
16 MR. CRUZ: Under *Milliken*, the question would be
17 the relation --
18 QUESTION: No. I want to know under you.
19 (Laughter.)
20 QUESTION: On your theory, isn't that going to
21 be your answer?
22 MR. CRUZ: Our answer is going to be that the --
23 the jurisdiction that this Court has created under *Ex*
24 *Parte Young* and its progeny exists for one purpose, to
25 vindicate the Supremacy Clause.

1 QUESTION: No, but you're -- you're getting into
2 -- into a general answer, and I want a specific answer.
3 As I understand it, you would say that in -- that
4 following the litigated case with an A, B, C, D order, you
5 would say that if -- if the State -- if the -- if the
6 other side tried to enforce A, B, C, and D, you could come
7 into court and say, we are not now violating Federal law
8 in the sense originally alleged. Therefore, A, B, C, D,
9 and E cannot be enforced. Isn't that correct, that that
10 would be your position?

11 MR. CRUZ: If C and D were necessary to ensure
12 compliance with Federal law, then they would be
13 permissible remedies once there was a finding under
14 Federal law.

15 QUESTION: Well, all right. Let's -- let's
16 compromise on an answer to the question. Your answer
17 would be we can always object to A, B, C, and D. We may
18 or may not succeed, but we can always object to it, even
19 though we haven't appealed it.

20 MR. CRUZ: If there's an ongoing injunction --

21 QUESTION: We didn't -- we didn't appeal saying,
22 look, Supreme Court, they -- you know, they -- they nailed
23 us to the wall on liability, but they do not have
24 jurisdiction to order A, B, C, and D and E because they
25 don't have jurisdiction to enforce it. You didn't take

1 that appeal and yet you feel you can raise that later.

2 MR. CRUZ: If the injunction is ongoing, then
3 the State officials could come in at any point and say, C,
4 D, and E are not necessary --

5 QUESTION: Can I ask you what is the purpose of
6 doing this? I mean, let's think of the Medicare
7 provisions or the Social Security provisions, the
8 regulations, the statutes. They cover volumes. Think of
9 consent decrees. Yours is only 80 pages. I guess others
10 might be hundreds of pages. And so what you're saying is
11 that after these have been entered, they've been entered
12 because there was a violation of Federal law in the view
13 of the plaintiff and the defendant agreed. Okay?

14 Now, what you're saying is at any time, we go
15 through these hundreds of pages and we try to figure out
16 whether each word in these hundreds of pages actually in
17 itself reflects the Federal law violation, of which,
18 remember, there were 3,000 volumes, or the State law
19 violation, of which there were 10,000 more volumes, and
20 once we figured that out, then you're going to say you can
21 do paragraph 867 but you can't do paragraph 868. Now, I
22 just wonder what is the purpose of this exercise?

23 MR. CRUZ: Justice Breyer, two responses. First
24 of all, there was not an agreement that there was a
25 violation of Federal law. It's certainly true the

1 plaintiffs --

2 QUESTION: No. I -- I don't -- that's not --

3 MR. CRUZ: -- consent decree explicitly --

4 QUESTION: That's not answering my question at
5 all. So would you please direct yourself to my question?

6 MR. CRUZ: The second response -- your -- your
7 question refers to volumes of Federal law and State law
8 that may or may not have been violated. This case is very
9 simple. It's one short section of Federal law.

10 QUESTION: I'm not asking about this case. I'm
11 asking about the purpose of the exercise that you are
12 suggesting that the Constitution requires us to undertake.
13 My suggestion was that it is -- I was trying to make it
14 look absurd to go through that exercise because it would
15 put everybody to a lot of work for no real reason. That
16 was what I was trying to suggest. Now, I suggested it so
17 you would respond to it because I'm sure you don't agree
18 with that, and therefore, I'd like you to present the
19 response.

20 MR. CRUZ: Justice Breyer, the exercise of
21 requiring a -- a violation of Federal law derives from
22 this Court's cases beginning with Ex Parte Young and
23 moving on.

24 QUESTION: You're saying the cases require it.
25 Now, if that's so, that's the end of it. You're right.

1 But I had the impression a different case had a much
2 better solution to the problem that you raise, which is
3 that there's some provisions in this thing that really
4 have nothing to do with Federal law at all. And that's
5 called Rufo. And what the -- what -- what you're supposed
6 to do in that situation is you can make your argument.
7 You go to court. You say rule 60(b). You say, judge, you
8 see this provision over here? This has nothing to do with
9 anything. And if the judge is right, you win. Now, why
10 isn't that a much more practical approach for the problem
11 that you're raising?

12 MR. CRUZ: Justice Breyer, under the Fifth
13 Circuit precedent, the means to challenge this sort of
14 decree is precisely what we did, to challenge it. Under
15 the Lelsz v. Kavanagh case, the means to challenge it is
16 to challenge the enforcement and --

17 QUESTION: You mean you can never move for
18 modification prior to an enforcement action?

19 MR. CRUZ: Well, you can, and that's the second
20 part which is the Fifth Circuit treated what we did as a
21 motion to modify or vacate the decree. That's how the
22 Fifth Circuit interpreted what we did. The -- the
23 plaintiffs came in at a year and a half --

24 QUESTION: The Fifth Circuit -- excuse me. The
25 Fifth Circuit said you had to -- you had to segment this

1 decree into bites, and plaintiff had to prove each one of
2 them as a violation of Federal law. That's worlds
3 different from saying, here's a decree, time has shown
4 that it's not -- that it's too onerous, so court, please
5 modify it. 60(b)(5) accepts the decree as valid and
6 enforceable, but says that it should be modified in light
7 of our experience under it. Now, that's quite different
8 from saying you can't enforce it. You have to prove the
9 case all over again at the enforcement stage.

10 MR. CRUZ: It is true that treating our -- our
11 argument as a motion to modify is not purely based upon
12 changed facts and law. It is in part because you have the
13 2 years of compliance and the tremendous record the State
14 has, but another fundamental element of it was a challenge
15 that the terms of the consent decree go far beyond what
16 Federal law requires. And let me focus just for a
17 moment --

18 QUESTION: Why don't you make a virtue of a
19 necessity and say that that is precisely your response to
20 Justice Breyer, that you cannot do what you want to do
21 under rule 60(b)?

22 MR. CRUZ: That --

23 QUESTION: Why not? That's --

24 QUESTION: For the reason that Justice Ginsburg
25 stated, that all 60(b) enables you to do is to eliminate

1 provisions that -- that have been found too onerous, not
2 to eliminate provisions that are not indeed terribly
3 onerous but go beyond what -- what the court had
4 jurisdiction to impose. It's a totally different
5 question.

6 MR. CRUZ: My -- my --

7 QUESTION: Right?

8 MR. CRUZ: My hope --

9 QUESTION: So that's your answer to Justice
10 Breyer.

11 MR. CRUZ: My -- my hope would be --

12 QUESTION: But that -- that leaves you with
13 Justice Ginsburg's problem

14 (Laughter.)

15 MR. CRUZ: My hope would be to make virtues out
16 of either approach and to say that it could either be done
17 on -- under an effort to modify or a challenge of
18 enforcement, that either avenue is available. And the
19 Fifth Circuit treated it as both. I mean, that's
20 precisely what the Fifth Circuit did. The -- the --

21 QUESTION: Modification doesn't depend on
22 changed circumstances, does it, under that theory? You're
23 saying we want to modify it because we shouldn't have
24 agreed to it in the first place.

25 MR. CRUZ: Well, we don't know what the

1 circumstances were when -- when this matter was entered
2 because there was no adjudication on the merits. But we
3 do know now --

4 QUESTION: Well, but there are allegations of
5 fact that would have -- the allegations did allege a -- a
6 violation of Federal law, did they not?

7 MR. CRUZ: If those -- they did, and if those
8 allegations were true, then there are changed
9 circumstances because the district court was very clear
10 that there is absolutely no evidence that even a single
11 class member has ever requested services and been denied.
12 And that really is the nub of the dispute because
13 petitioner --

14 QUESTION: Yes, but that's not an answer to all
15 -- the statute requires more than waiting for requests to
16 be made.

17 MR. CRUZ: But -- but that really is the
18 critical dispute because the statute, the Medicaid
19 statute --

20 QUESTION: As I understand the record, you've
21 made marvelous and extensive changes in your practices,
22 and that's why you're in such wonderful shape now. But
23 maybe you wouldn't have been if the lawsuit had never been
24 filed.

25 MR. CRUZ: That's possible, and so this could be

1 fairly characterized as a motion to modify because there
2 is not an ongoing violation of Federal law now.

3 What the Federal law requires is that whenever
4 an eligible member requests screening, they receive it.
5 Petitioners don't like that reading and what the
6 petitioners convinced the Federal district court to do in
7 this case is read the words where they are requested out
8 of the statute. And all of this fight about what the
9 proper baseline is, is it Federal law or is it the
10 consent --

11 QUESTION: Well, but I want to know if you could
12 go -- could you go through 60(b)? That's interesting.

13 Now, imagine -- I'll give a silly example to
14 make it clear -- that there's a requirement in the consent
15 decree you have to give every child a hair cut. And
16 Federal law doesn't require that, but there's a provision
17 in State law that the barbers' union got in. All right?

18 (Laughter.)

19 QUESTION: So every child has to have a hair
20 cut. So you find the decree and you go say, judge, I want
21 this modified. Look what it is over here. They give
22 every child a hair cut. That has nothing to do with
23 Federal law whatsoever. We don't want to give every child
24 a hair cut. Can you get the decree modified under 60(b)?

25 MR. CRUZ: Yes.

1 QUESTION: Yes. All right. Well, then if you
2 could get it modified under 60(b), this isn't really a
3 solution. You don't need your solution. You can go in
4 under 60(b).

5 MR. CRUZ: And that's what the Fifth Circuit
6 treated what we did. So we --

7 QUESTION: All right. So then there's no
8 problem. We're all in agreement.

9 MR. CRUZ: We will prevail either way.

10 QUESTION: So if we think you have a right to go
11 in under 60(b), is that the end of the case?

12 MR. CRUZ: If -- if what we did is deemed that,
13 because --

14 QUESTION: Mr. Cruz --

15 QUESTION: You have to assume that it's too
16 onerous, that everything that goes -- goes a bit beyond
17 what Federal law demands is, quote, too onerous. Is that
18 -- is that your theory of 60(b)?

19 MR. CRUZ: It's not a bit beyond and -- and one
20 important caveat of 60(b) is most of this Court's 60(b)
21 cases are in a context where the State or a State official
22 is not a defendant.

23 QUESTION: Well, 60(b) is basically changed
24 circumstances or changed law, isn't it?

25 MR. CRUZ: It is. And --

1 QUESTION: But beyond that, Rufo said that when
2 you're dealing with a State or a municipality, that the
3 60(b) is more flexible than it would be if you were
4 dealing with a private party.

5 MR. CRUZ: It -- it did. Rufo was easing the
6 standards for modification, and Rufo did not address the
7 Eleventh Amendment. That was not an issue that was
8 litigated, and the Court --

9 QUESTION: Yes, but we're talking about 60(b).
10 And I think the -- the -- you're saying, well, this is
11 essentially the same thing. It isn't because what you've
12 confronted us with is you said, yes, the court had
13 jurisdiction to enter this decree, but it had no
14 jurisdiction to enforce it. That was your plain position,
15 and that's not a 60(b) position. 60(b) is the court can
16 enforce it unless and until you show grounds for
17 modification.

18 MR. CRUZ: We don't necessarily concede that the
19 court should have entered this decree, but the point at
20 which we litigated it is the point at which the Federal
21 court began to exercise coercive authority of a Federal
22 court over the State. And at that point --

23 QUESTION: It didn't exercise authority till the
24 plaintiffs came in and said, look, they're violating the
25 decree. They're not carrying out all their promises.

1 MR. CRUZ: But --

2 QUESTION: You could have said, yes, we are.

3 MR. CRUZ: But what --

4 QUESTION: You didn't say that.

5 MR. CRUZ: We did say that. We argued
6 extensively that we were carrying out our promises.

7 And that actually highlights a point. One thing
8 petitioners argue a great deal is the unfairness, and that
9 was a motivating factor in this Court's Lapidés decision.
10 But I would point out petitioners did not give anything up
11 when they signed this agreement. It's not as if we could
12 sign an agreement with them and agree we're going to
13 comply with 80 percent of Federal law.

14 QUESTION: They gave up their lawsuit, and
15 you're -- you're -- and you know, packed up and went home,
16 and you're telling them that they -- that they
17 accomplished nothing by doing that. They got to re-
18 initiate the whole -- the whole legal process to get you
19 to do what they want you to do.

20 MR. CRUZ: Justice Scalia, they accomplished a
21 number of things. One, the State voluntarily engaged in a
22 number of changes as a result of that agreement. Two --

23 QUESTION: Well, you can't say it was
24 voluntarily. They did it because the decree required them
25 to do it. That's coercive. I mean, you say it's

1 voluntary, but then why didn't you do it before the
2 lawsuit started?

3 MR. CRUZ: The State officials endeavored to
4 improve the program --

5 QUESTION: To comply with the decree.

6 MR. CRUZ: But the decree was drafted as an
7 effort to end this -- this litigation.

8 QUESTION: Yes, but it imposed obligations on
9 the defendants which they had to perform in -- to avoid
10 being held in contempt of court.

11 MR. CRUZ: Your Honor, that actually opens the
12 door to yet another reason why we do not believe this
13 Court should hold that Ex Parte Young defendants can
14 engage in commitments that extend far beyond Federal law
15 because that open -- opens a Pandora's box to separation
16 of powers problems.

17 QUESTION: It's -- it's maybe far beyond. I'm
18 -- I'm not sure that it is but it's permissible. Rufo was
19 concerned with requirements that were not permissible
20 under Federal law. And that's -- that's not this case.
21 And you have the obligation, even under 60(b), to show
22 that compliance is burdensome and there's changed
23 circumstances, and you haven't shown that.

24 MR. CRUZ: Justice Kennedy, no body of law,
25 Federal or State law, requires virtually everything that's

1 in the consent decree. The consent decree requires data
2 collection, and there's no reference to that in Federal
3 law. The consent decree requires the State officials --

4 QUESTION: These are just necessary procedures
5 to implement the program and to make it work well.

6 MR. CRUZ: I mean, the consent decree --

7 QUESTION: And they were agreed to you by your
8 client.

9 MR. CRUZ: The consent decree requires that the
10 State officials train private health care workers in
11 cultural sensitivity. Now, that's not required by Federal
12 law. That's not necessarily to ensure compliance with
13 Federal law. It is something quite simply --

14 QUESTION: Well, suppose it were shown that the
15 failure to do this caused serious flaws in the
16 implementation of the program

17 MR. CRUZ: The Federal law requires --

18 QUESTION: The court surely has the authority --
19 and the parties certainly have the right -- to stipulate
20 to provisions that will make the consent decree effective.

21 MR. CRUZ: A State official does not have the
22 right to bargain away his or her constitutional authority
23 or the legislature's. If one might imagine a
24 hypothetical. The legislature --

25 QUESTION: But that's -- that's the issue.

1 QUESTION: Well, excuse me. Certainly the State
2 Attorney General has -- and by the way, I would like you
3 to say a few words about the other -- the other basis and
4 that is the waiver basis. Certainly the State Attorney
5 General does have the power to bargain away the State's
6 sovereign immunity if -- if you consider that bargaining
7 it away.

8 MR. CRUZ: Justice Scalia --

9 QUESTION: Why -- assuming everything you said
10 is true, that this goes beyond what could have been
11 imposed under Ex Parte Young, nonetheless, you had the
12 State Attorney General who agreed to all of this. It was
13 not just these individual officers. The State Attorney
14 General who had power to waive sovereign immunity signed
15 this consent decree. Why shouldn't that be the end of the
16 case?

17 MR. CRUZ: Justice Scalia, the premise of the
18 question that the Attorney General had power to waive
19 sovereign immunity is not correct under Texas law. Now,
20 it is admittedly a question of Federal law, but Federal
21 law looks to State law.

22 In answer to your question about waiver, we have
23 seven reasons why we believe the Court should not find
24 that there was a waiver.

25 First, that this was waived below.

1 Secondly, there's no clear and unambiguous
2 waiver, as this Court's decisions require.

3 Thirdly, there has been no waiver by the
4 legislature of immunity from liability in State court, a
5 critical predicate for Lapires, and in fact, the United
6 States in Lapires argued that all the Attorney General
7 could waive was forum immunity, not immunity from
8 liability -- immunity from suit at all.

9 QUESTION: May I stop you at that point? Could
10 a State then simply say -- every State say our Attorney
11 General has no authority to waive our sovereign immunity,
12 and then you would have the highest legal officer
13 appearing in Federal court on behalf of the State and
14 representations that that person makes count for nothing?
15 Is that --

16 MR. CRUZ: Justice Ginsburg, your -- your
17 hypothetical is in fact the law in the Texas, in that the
18 legislature has explicitly said the Attorney General may
19 not waive sovereign immunity in Government Code 402.004.

20 QUESTION: Then what was the attorney -- then
21 the Attorney General was really deceiving the Federal
22 court when the Attorney General said, this is a consent
23 decree that we worked out, we urge the court to adopt it.
24 Now, if the Attorney General had no authority to enter
25 that consent decree, he should have told that to the

1 Federal court, but there was no -- no such representation.

2 MR. CRUZ: Justice Ginsburg, the Attorney
3 General didn't deceive the court because the Attorney
4 General never represented that this was a waiver of
5 sovereign immunity. Those words are not found in the
6 consent decree. The consent decree says the defendants'
7 defenses are all preserved. This was an effort, unlike
8 all of the voluntary invocation of jurisdiction cases,
9 where the State makes an affirmative decision, we want to
10 be in Federal court. In this case the State was hailed
11 involuntarily --

12 QUESTION: But nothing required the State to
13 agree to this consent decree. I know you distinguished
14 the case -- Lapidés was -- you said that they -- the State
15 made the move to get the case into the Federal court. But
16 here, yes, the State is a defendant. Nothing in the world
17 compelled it to enter the consent decree, to urge the
18 court to accept its consent. So when a State Attorney
19 General says to the Federal judge, Federal judge, we think
20 this is a sound decree, we want you to enter it, that's
21 hardly being hauled before the court. That's a voluntary
22 decision.

23 MR. CRUZ: The State acted in an attempt to
24 avoid a long, protracted litigation. We were hailed
25 involuntarily before the Federal court.

1 QUESTION: In Gunter, the State was also hailed
2 involuntarily before the Federal court.

3 MR. CRUZ: Yes, Mr. Chief Justice, but Gunter
4 was an adjudication on the merits and found an ongoing
5 violation of Federal law and then enjoined that ongoing
6 violation. Had that happened, we wouldn't have a dispute.
7 We don't --

8 QUESTION: Well, you prevented it from happening
9 by entering into the consent decree.

10 MR. CRUZ: But that could have happened at the
11 stage of enforcement. Before a Federal court orders a
12 State to do something, this Court has said that Ex Parte
13 Young is a fiction, that -- that the courts will pretend
14 the State official, who is not really a State official, is
15 acting ultra vires for the limited purpose of vindicating
16 the Supremacy Clause. That limited purpose is not served
17 when no court has ever found a violation of Federal law,
18 and when there is in fact not a violation of Federal law.

19 The reasons petitioners are litigating today is
20 because if they had to demonstrate a violation of Federal
21 law, they could not do so. So what they would, instead,
22 like is for the baseline to be the consent decree.

23 QUESTION: Are you suggesting they filed a
24 lawsuit they didn't think they could win?

25 MR. CRUZ: They filed a lawsuit that was filed

1 before Judge William Wayne Justice --

2 QUESTION: It was filed in good faith alleging
3 violations of Federal law, was it not?

4 MR. CRUZ: It was -- it -- we presume it was
5 filed in good faith and it alleged violations of Federal
6 law. We don't believe they could have demonstrated then
7 and we -- we absolutely don't believe they can demonstrate
8 now any violations of Federal law. Both the district
9 court and --

10 QUESTION: Then why enter a consent decree? It
11 just doesn't make sense. I assume that whatever counsel
12 was representing the State at that time thought there was
13 sufficient grounds to justify entering into a consent
14 decree, unless you want to take the position that the
15 attorney was acting totally ultra vires.

16 MR. CRUZ: It was an effort to end the
17 litigation. It was an effort that ultimately failed. I
18 mean, there -- there are two additional key reasons why
19 there's not waiver.

20 QUESTION: No. But you're saying then that the
21 consent decree is basically a continuance.

22 MR. CRUZ: It is a voluntary agreement and it
23 allows -- it agrees that the district court is available,
24 it's familiar with the law and facts and can -- the case
25 can be brought back to it if there's ongoing dispute.

1 QUESTION: Right. We'll see -- a consent decree
2 means we'll see you later.

3 MR. CRUZ: Or we'll agree to this and that will
4 resolve the matter.

5 I will point out if signing a consent decree is
6 a waiver of Eleventh Amendment immunity or sovereign
7 immunity, then plaintiffs' argument proves too much. It
8 means every consent decree is utterly immune from Ex Parte
9 Young. It means once a consent decree is there, the
10 requirements of Federal law don't matter.

11 QUESTION: Only with the State Attorney General.

12 (Laughter.)

13 QUESTION: You haven't made another argument
14 that -- that I thought you -- you would make, and that is
15 not applicable to the waiver argument, which requires that
16 the State Attorney General or someone authorized to act
17 for the State is there. What -- what troubles me about --
18 about the non-waiver argument made by the petitioner is
19 that some of these consent decrees are imposed upon --
20 upon absolutely willing State officers who want to be
21 thrown into the briar patch. A suit is brought against a
22 -- a secretary of health and human services in the State
23 who absolutely wants to do these wonderful things for
24 pediatric care that are not required by Federal law. And
25 if the State Attorney General were not in the situation, I

1 am very reluctant to think that this official can go in
2 and say, yes, require me to do these wonderful things that
3 State law does not require, that Federal law does not
4 require, but that I would like to do, signs the consent
5 decree, and then we're stuck.

6 MR. CRUZ: That --

7 QUESTION: But that's not this situation. Your
8 Attorney General appeared and said, this is okay as far as
9 we're concerned.

10 MR. CRUZ: But -- but that is a fundamental
11 problem with these cases. It was a prior Attorney
12 General, a prior head of the health department, and those
13 prior officers under petitioners' theory had bargained
14 away the legislature's authority. It's clear the
15 legislature couldn't pass a statute that said, we're going
16 to allow the Federal District Court for the Eastern
17 District of Texas to run our Medicaid program. That would
18 be a fundamental violation of federalism and separation of
19 powers. Nor could the Attorney General sign a contract to
20 do that. Therefore, they should not be able to sign a
21 consent decree to do that unless it is necessitated by an
22 ongoing violation of Federal law. It is only the
23 Supremacy Clause that justifies that.

24 In addition, this course's voluntary -- this
25 Court's voluntary invocation of Federal jurisdiction cases

1 have, by and large, not been Ex Parte Young cases. In
2 Lapiques, in Gardner, in Clark, they were suits against the
3 State. They were not Ex Parte Young cases, and this Court
4 would be breaking new ground by saying an Ex Parte Young
5 defendant who, under the legal fiction, is not the State,
6 is simultaneously the State for purpose of being able to
7 waive sovereign immunity by litigating.

8 And as was pointed out in the earlier colloquy,
9 the State was a defendant, raised the Eleventh Amendment,
10 was dismissed on Eleventh Amendment sovereign immunity.
11 And to say now that ambiguous and conflicting provisions
12 of the consent decree, signed by the State officials as Ex
13 Parte Young defendants, can waive the sovereign immunity
14 is to extend the Ex Parte Young fiction beyond --

15 QUESTION: Well, surely they had attorneys,
16 State attorneys, representing them, did they not?

17 MR. CRUZ: They -- they did, Mr. Chief Justice.
18 But those attorneys, just like the State officials, are
19 temporary officeholders, and temporary officeholders are
20 in effect, as this Court recognized in Alden v. Maine and
21 also in Justice Thomas' and Justice O'Connor's opinions in
22 Missouri v. Jenkins, there are serious separation of
23 powers issues that are raised when one official bargains
24 away the authority of another.

25 QUESTION: Thank you, Mr. Cruz.

1 Ms. Zinn, you have 4 minutes remaining.

2 REBUTTAL ARGUMENT OF SUSAN F. ZINN

3 ON BEHALF OF THE PETITIONERS

4 MS. ZINN: Some of the arguments made are not
5 tethered in -- tethered or tied to the record in this
6 case. The district court, before enforcing the consent
7 decree, found violations of -- ongoing violations of
8 Federal law. That finding is found at pages -- at the
9 bottom of page 272 and 273 in the appendix to the cert
10 petition. And it -- it refers and relies on the Court's
11 earlier extensive findings of fact.

12 Second, there has been no contested motion to
13 modify filed in this case. There was no contested motion
14 to modify pending before the district court or pending
15 before the court of appeals, and this is an important
16 matter for this Court to consider. Of course, a motion to
17 modify would allow State officials to present legitimate
18 concerns, if they have any, concerning the consent decree
19 to the district court so that the district -- with them
20 having the burden of proof, so that they could have their
21 best shot to show the district court what's wrong with the
22 consent decree under this Court's decision in Rufo. That
23 -- that burden of proof gives the district court a full
24 record to base its decision on about whether or not to
25 modify the decree and it also creates an adequate record

1 for appellate review of those questions, which is not
2 present at the moment.

3 Indeed --

4 QUESTION: Would a change in administrations be
5 a change of circumstances that -- that justifies 60(b)
6 being invoked?

7 MS. ZINN: No.

8 Indeed --

9 QUESTION: Is there then a way to deal with the
10 problem that Justice Scalia raised, which is a serious
11 problem I think?

12 MS. ZINN: If a change in -- in administrations
13 results in --

14 QUESTION: Well, what they do is they go examine
15 this decree and there all kinds of things in the decree
16 that may be very nice and really helpful to people, but
17 actually the legislature would never pass them, and they
18 have nothing to do with Federal law. Now, what he's
19 looking for is a remedy for that situation. I'm not
20 saying your decree has that problem

21 MS. ZINN: Yes.

22 QUESTION: But it's a known problem, and what's
23 your solution to it?

24 MS. ZINN: As has been pointed out, Rufo does
25 create a more flexible standard for modification when

1 consent decrees are involved in institutional reform
2 litigation of this type. That flexibility, though, does
3 not sink down to the level of mere inconvenience. So just
4 because it becomes inconvenient for a successor
5 administration to comply with the consent decree is not
6 justification for modification. But if the -- the new
7 State officials can bring legitimate concerns to the
8 district court's attention, modification may be
9 appropriate.

10 Unless there are further questions, there's no
11 further reply.

12 CHIEF JUSTICE REHNQUIST: Thank you, Ms. Zimm.

13 The case is submitted.

14 (Whereupon, at 11:01 a.m., the case in the
15 above-entitled matter was submitted.)
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