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Pre-enforcement Challenge Lawsuit Backgrounder

What is a pre-enforcement challenge?

A pre-enforcement challenge is a lawsuit brought to challenge a law that has not yet been enforced against the challenger.[1] Courts allow pre-enforcement challenges **1)** when enforcement is "certainly impending" or a "substantial risk" or **2)** when the law presently injures the citizen.[2] This second scenario often occurs when a statute restricts free speech and litigants stop speaking to avoid penalties. To mitigate this "self-censorship" injury, courts frequently hear pre-enforcement challenges in the First Amendment context, even allowing speakers to challenge laws when they haven't been "directly" threatened with arrest.[3]

How common are pre-enforcement challenges?

Very common. As the United States Supreme Court noted in 1988 when it heard a pre-enforcement challenge, "[w]e are not troubled by the pre-enforcement nature of this suit."[4] Other courts agree. According to the United States Court of Appeals for the Seventh Circuit, "[i]t is well established that 'pre-enforcement challenges ... are within Article III.'"[5] And according to the United States Court of Appeals for the First Circuit, "the Supreme Court repeatedly has found standing to mount pre-enforcement challenges to laws that had never been enforced."[6]

How long have courts allowed pre-enforcement challenges?

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[1] *Seegars v. Gonzalez*, 396 F.3d 1248, 1251 (D.C.Cir. 2005) ("No plaintiff in this case has been arrested and prosecuted for violating the disputed provisions of the Code, so plaintiffs' case constitutes a 'preenforcement' challenge.").

[2] *Susan B. Anthony List v. Driehaus,* 134 S. Ct. 2334, 2341 (2014). *See also Kerin v. Titeflex Corp.*, 770 F.3d 978, 981 (1st Cir. 2014) (discussing two injury types).

[3] *Navegar, Inc. v. United States*, 103 F.3d 994, 999 (D.C.Cir. 1997) ("Federal courts most frequently find preenforcement challenges justiciable when the challenged statutes allegedly 'chill' conduct protected by the First Amendment.");*Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1015 n.5 (9th Cir. 2013) (explaining that speakers can challenge laws without receiving direct enforcement threats).

[4] *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988). The Supreme Court immediately elaborated in the same case: "The State has not suggested that the newly enacted law will not be enforced, and we see no reason to assume otherwise. We conclude that plaintiffs have alleged an actual and well-founded fear that the law will be enforced against them. Further, the alleged danger of this statute is, in large measure, one of self-censorship; a harm that can be realized even without an actual prosecution." *Id*.

[5] *ACLU v. Alvarez*, 679 F.3d 583, 590 (7th Cir. 2012).

[6] *Rhode Island Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 33 (1st Cir. 1999).

As early as 1923, the Supreme Court noted that "[o]ne does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough."[7] In 1925, the Supreme Court heard a challenge to a law requiring minors to attend public school that would not take effect for two years.[8] Pre-enforcement challenges became more common after 1970, once the Warren Court allowed pre-enforcement challenges to laws against abortion and teaching evolution.[9] In 1968, for example, the United States Supreme Court invalidated a state law prohibiting the teaching of evolution even though "there ha[d] never been even a single attempt by the State to enforce it" for the *forty years* after the law was passed in 1928.[10]

Why do courts allow pre-enforcement challenges?

1. In a free society, no one should have to be punished before they can challenge an unconstitutional law.[11]
2. If litigants had to go to jail or pay fines to challenge unconstitutional laws, very few would challenge these laws.[12] These laws would in turn remain on the books, violating many people's rights. By reducing the cost to challenge unconstitutional laws, courts give average citizens a fighting chance and increase the likelihood that governments comply with constitutional law.

Who uses pre-enforcement challenges?

Citizens across the ideological spectrum use pre-enforcement challenges to protect themselves and their constitutional freedoms. Challenges advancing "left-wing" or "liberal" interests are especially frequent.

For example, in 1998 the ACLU filed a pre-enforcement challenge to a New Mexico law "over two months prior to the statute's effective date…"[13] The law banned transmitting material harmful to minors, such as pornography, via computer.[14] In 2013, Planned Parenthood of Wisconsin filed a pre-enforcement challenge against a law on the day the governor signed it, three days before the law went into effect, and before the law had been enforced against anyone.[15] The law required abortionists to obtain admitting privileges at a nearby hospital.[16] In 1986, Planned Parenthood of Cincinnati challenged

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[7] *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923).
[8] *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925).
[9] *Epperson v. Arkansas*, 393 U.S. 97, 101-02 (1968); *Doe v. Bolton*, 410 U.S. 179, 188-89 (1973).
[10] *Epperson*, 393 U.S. at 109-10 (Black, J., concurring).
[11] *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007). *See also Bolton*, 410 U.S. at 188 (noting that litigants "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief.").
[12] *Mobil Oil Corp. v. Attorney General of Virginia*, 940 F.2d 73, 75 (4th Cir. 1991) ("Public policy should encourage a person aggrieved by laws he considers unconstitutional to seek a declaratory judgment against the arm of the state entrusted with the state's enforcement power, all the while complying with the challenged law, rather than to deliberately break the law and take his chances in the ensuing suit or prosecution.").
[13] *ACLU v. Johnson*, 194 F.3d 1149, 1153 (10th Cir. 1999).
[14] *Id*. at 1152-54.
[15] Planned Parenthood of Wisconsin, Inc. v. Van Hollen, 738 F.3d 786, 787-88 (7th Cir. 2013).
[16] *Id*.

a law the same day it went into effect and before it had been applied to anyone.[17] The law required abortion clinics to dispose of aborted baby remains in particular ways, such as interment or cremation, to ensure a safe, sanitary, and dignified resting place.[18] And on October 17, 2005, two groups representing the video game industry challenged a law restricting the sale of violent video games to minors, even though this law did not go into effect until January 1, 2006.[19] The United States Supreme Court eventually heard this "preenforcement challenge" and invalidated the law.[20]

News reporters also use pre-enforcement challenges to protect their rights. In 1999, a newspaper reporter challenged a criminal defamation statute, even though that statute had never been enforced against the reporter, because it deterred the reporter from investigating government officials for criminal activities.[21] The United States Court of Appeals for the First Circuit heard the reporter's challenge because the reporter's "credible fear of being haled into court on a criminal charge is enough for the purposes of standing, even if it were not likely that the reporter would be convicted."[22]

Litigants have continued to use pre-enforcement challenges to advance many other goals:

- To protect partial birth abortions.[23]
- To protect the sale and display of pornography.[24]
- To challenge the government's anti-terrorism surveillance programs.[25]
- To challenge laws against polygamy.[26]
- To display virtual child pornography.[27]
- To protect unions' ability to advertise and organize.[28]
- To protect speech critical of the Vietnam War.[29]
- To prevent students from praying during high school football games.[30]
- To protect the ability of animal rights groups to protest.[31]
- To advise groups designated foreign terrorist organizations.[32]
- To protect citizens' ability to videotape police officers.[33]

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[17] *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1391-96 (6th Cir. 1987).
[18] *Id*.
[19] *Video Software Dealers Ass'n v. Schwarzenegger*, 401 F. Supp. 2d 1034, 1037-39 (N.D. Cal. 2005).
[20] *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 789, (2011).
[21] *Mangual v. Rotger-Sabat*, 317 F.3d 45, 53-54 (1st Cir. 2003).
[22] *Id*. at 59.
[23] *Planned Parenthood of Cent. New Jersey v. Farmer*, 220 F.3d 127 (3d Cir. 2000).
[24] *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383 (1988).
[25] *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138 (2013).
[26] *Bronson v. Swensen*, 500 F.3d 1099 (10th Cir. 2007).
[27] *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002).
[28] *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289 (1979).
[29] *Steffel v. Thompson*, 415 U.S. 452 (1974).
[30] *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, (2000).
[31] *Blum v. Holder*, 744 F.3d 790 (1st Cir. 2014).
[32] *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010)
[33] *ACLU v. Alvarez*, 679 F.3d 583 (7th Cir. 2012).