

# Pre-Enforcement Challenges & Constitutional Freedoms



**Q:** I believe a law threatens to take away some of my rights. How can I protect myself?

**A:** You don't have to watch your freedoms disappear or face crippling fines or other penalties before asking a court for help. As an American, you are free to challenge an unjust law that threatens your rights. Challenging a law before it has been enforced against you is known as a "pre-enforcement" lawsuit.

## HISTORY:

Pre-enforcement lawsuits have been a hallmark of America's tradition of civil-rights litigation for over a hundred years. Beginning in the mid-nineteenth century, American courts began to hear cases challenging potential public nuisances (like building noisy factories next to quiet neighborhoods) before they became actual nuisances.

**Since then, the Supreme Court has heard a pre-enforcement action in every decade since the year 1900 and has ruled on at least thirteen pre-enforcement cases in the last ten years.** Lower courts hear hundreds of pre-enforcement lawsuits each year challenging laws that discriminate based on race, laws that restrict speech, and regulations on alcohol sales, insurance, immigration, labor unions, land use, abortion, and private-club memberships.

**Pre-enforcement lawsuits allow people to avoid the impossible choice between risking prosecution or giving up their freedom.** They are especially important for protecting the right to free speech. The easiest way to prevent a law from silencing speech is to challenge it before it punishes people—laws regulating speech can cause people to stop sharing their views in public. Pre-enforcement challenges have helped countless Americans to live and speak freely without the threat of government punishment.

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**The harm 'of self-censorship ... can be realized even without an actual prosecution.'**

*Virginia v. Am. Booksellers Ass'n, Inc.,*  
484 U.S. 383, 393  
(1988)



## KEY FACTS:

**In 1887, the United States Supreme Court affirmed its ability to hear cases about future injuries in a case called *Mugler v. Kansas*.** Since then, the Supreme Court and other courts across the country have regularly heard pre-enforcement cases. The Supreme Court even heard challenges to the Affordable Care Act four years before any penalties became effective.

**A wide variety of individuals, advocacy organizations, and states from across the ideological spectrum bring pre-enforcement challenges to protect a broad range of interests.** This includes the ACLU, the Southern Poverty Law Center, Lambda Legal Defense and Education Fund, the Human Rights Campaign, Planned Parenthood, the Transgender Law Center, the NAACP, the People for the Ethical Treatment of Animals, the National Rifle Association, Speech First, Incorporated, the Institute for Justice, Center for Individual Freedom, the Becket Fund for Religious Liberty, Hamilton Lincoln Law Institute, and conservative and liberal states.

**Pre-enforcement actions have been brought by groups across the ideological spectrum to challenge laws that regulated speech on countless topics** including politics, video games, unions, animal welfare, pornography, advice to foreign terrorist groups, and war.

**Groups across the ideological spectrum have also brought pre-enforcement actions about a broad range of other topics including** including challenges to laws that prohibited polygamy, regulated abortion, banned sanctuary cities, regulated immigration, limited voter access, restricted gun ownership, and protected women's sports.

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**[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights.**

*Steffel v. Thompson*, 415 U.S. 452, 459 (1974).