

Nos. 19-840, 19-1019

In the
Supreme Court of the United States

CALIFORNIA, ET AL., *Petitioners*,

v.

TEXAS, ET AL., *Respondents*.

TEXAS, ET AL., *Petitioners*,

v.

CALIFORNIA, ET AL., *Respondents*.

**On Writs of Certiorari to the
United States Court of Appeals for the Fifth Circuit**

**BRIEF OF *AMICI CURIAE* SAMUEL L. BRAY,
MICHAEL W. MCCONNELL AND
KEVIN C. WALSH IN SUPPORT OF
PETITIONERS IN NO. 19-840**

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IDENTITY AND INTEREST OF *AMICI CURIAE*¹

Samuel L. Bray is Professor of Law at Notre Dame Law School. He teaches and writes about remedies, constitutional law, and civil procedure. His scholarship includes two articles on the declaratory judgment.

Michael W. McConnell is the Richard & Frances Mallery Professor of Law and Director of the Constitutional Law Center at Stanford Law School. He served as Circuit Judge on the United States Court of Appeals for the Tenth Circuit from 2002-2009.

Kevin C. Walsh is Professor of Law at the University of Richmond School of Law. He teaches and writes about the law of federal jurisdiction. His scholarship includes law review publications on jurisdictional matters that have previously arisen in ACA mandate litigation.

As experts in the law of federal jurisdiction or remedies, the amici curiae Professors have an interest in the proper application of that law and believe that their perspective will be helpful to the Court in its disposition of this matter. In particular, the statutory-jurisdiction argument presented in this brief enables the Court to uphold traditional limits on federal judicial power without either reaching the difficult Article III questions presented by this case or running

¹ No counsel for any party has authored this brief in whole or in part, and no person other than the amici or their counsel have made any monetary contribution intended to fund the preparation or submission of this brief. All parties have filed blanket consents to the filing of amicus curiae briefs in these matters.

afoul of the rule against assuming hypothetical jurisdiction. *See generally Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 88-93 (1998).

SUMMARY OF ARGUMENT

Under the *Skelly Oil* rule, the federal courts have no statutory jurisdiction over a federal declaratory judgment action unless one of the parties to the action could have brought a nondeclaratory action about the same issue against the other party. The declaratory judgment in this case violates the *Skelly Oil* rule, and it should be reversed.

ARGUMENT

I. *Skelly Oil* requires dismissal for lack of statutory subject-matter jurisdiction.

As this case comes to this Court, everything depends on Plaintiffs' claim that 26 U.S.C. § 5000A is unconstitutional. *See* Final Judgment on Count I, No. 19-840 Petn. for Cert. Appx. 116a. But Section 5000A is entirely unenforceable against Plaintiffs; there is nothing to enforce. And because Section 5000A cannot be enforced against Plaintiffs, Section 5000A's enforcement against them cannot be enjoined. Congress has not vested the federal courts with statutory subject-matter jurisdiction to opine whether this unenforceable provision is also unconstitutional.

Because the Declaratory Judgment Act "enlarged the range of remedies available in the federal courts, but did not extend their jurisdiction," this Court has held that there is no statutory jurisdiction over a federal declaratory judgment action unless one of the

parties to the action could have brought a nondeclaratory action about the same issue against the other party. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 71-72 (1950); *see also Medtronic, Inc. v. Mirowski Family Ventures, LLC*, 571 U.S. 191, 197 (2014) (“[T]he Declaratory Judgment Act does not ‘extend’ the ‘jurisdiction’ of the federal courts.” (quoting *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950))). The basic rule from *Skelly Oil* is that “the existence of jurisdiction over a declaratory action depends on the answer to a hypothetical question: had the Declaratory Judgment Act not been enacted, would there have been a nondeclaratory action (i) concerning the same issue, (ii) between the same parties, (iii) that itself would have been within the federal courts’ subject-matter jurisdiction?” Richard H. Fallon, Jr., et al., *Hart & Wechsler’s The Federal Courts and the Federal System* 841 (7th Ed. 2015).

Perhaps as a result of the district court’s use of Rule 54(b) to grant partial summary judgment on Count One of the Amended Complaint, Petn. for Cert. Appx. 116a, neither the district court nor the Fifth Circuit has applied *Skelly Oil*. This Court should apply the *Skelly Oil* rule to uphold against erosion the traditional limitations on judicial power this rule protects.

Application of the *Skelly Oil* rule is fatal here because the federal government has no right to nondeclaratory relief against any Plaintiffs with respect to Section 5000A, and none of the Plaintiffs has a right to nondeclaratory relief against any federal official’s enforcement of Section 5000A.

Consider, first, the absence of any available action for nondeclaratory relief by the federal government against either the Individual or State Plaintiffs. The federal government has no right to nondeclaratory relief against Individual Plaintiffs John Nantz and Neill Hurley because the only enforcement mechanism for the mandate is the tax, which is zero. And the government has never been able to enforce Section 5000A against State Plaintiffs.

Next consider the absence of any available action for nondeclaratory relief by the Individual or State Plaintiffs against the federal government regarding its enforcement of Section 5000A. Injunctions run against officials not laws: “If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding.” *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). Because the United States cannot enforce Section 5000A against Individual or State Plaintiffs, there is no basis for a federal court to enjoin “the acts of the official, the statute notwithstanding.” *Id.*

This case presents potentially vexing jurisdictional and remedial issues that arise only because of the unexplained application of the Declaratory Judgment Act by the courts below. If the *Skelly Oil* rule were to be applied by this Court, nothing would remain of Plaintiffs’ judgment below.

CONCLUSION

The judgment before the Court in this case exceeds the limited statutory jurisdiction conferred by Congress. The judgment of the court of appeals should be reversed.

Respectfully submitted,

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