No. 22-149

IN THE

Supreme Court of the United States

ROSALIE WEISFELD, *et al.*,

Petitioners,

v.

JOHN SCOTT, TEXAS SECRETARY OF STATE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

RICHARD MANCINO
JOANNA SURIANI
FERDINAND G. SUBA JR.
FREDERICK SWANSTRUM
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019
(212) 728-8000

HANI MIRZA
Counsel of Record
ZACHARY DOLLING
CHRISTINA M. BEELER
TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Drive
Austin, TX 78741
(512) 474-5073
hani@texascivilrightsproject.org

ERIC MAYER
ALEXANDRA FOULKES
SUSMAN GODFREY LLP
1000 Louisiana Street, Suite 5100
Houston, TX 77002
(713) 651-9366

STEPHEN I. VLADECK
727 East Dean Keeton Street
Austin, TX 78705
(512) 475-9198

Counsel for Petitioners

318120

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REPLY BRIEF

The central principle of *Ex parte Young*, 209 U.S. 123 (1908), is that state officers who enforce state law in violation of federal law may not invoke sovereign immunity as a federal defense in a suit for injunctive relief. The officer's enforcement role has always been key: if sued merely as a representative of the state, the officer is entitled to the state's immunity. But if he bears "some connection with the enforcement of the act" alleged to violate federal law, *id.* at 157, then no immunity is available. That understanding, as then-Justice Rehnquist explained, "has permitted the Civil War Amendments to the Constitution to serve as a sword, rather than merely as a shield, for those whom they were designed to protect." *Edelman v. Jordan*, 415 U.S. 651, 664 (1974).

Applying that principle, this ought to be an easy case: Petitioners sought injunctive relief against Texas's Secretary of State ("SOS"),[1] claiming that his enforcement of the state's signature-comparison procedure for mail-in ballots violates the Fourteenth Amendment's Due Process and Equal Protection Clauses, as well as two federal statutes.

The SOS is Texas's "chief election officer." Tex. Elec. Code § 31.001(a). He has the duty to "obtain and maintain uniformity in the application, operation, and interpretation of" election laws, including by "prepar[ing] detailed and comprehensive written directives and instructions relating to" the signature-comparison procedure. *Id.* § 31.003. He is also charged to "take appropriate action to protect" Texans' voting rights "from abuse by the authorities administering

[1] Jane Nelson became the new SOS on January 7, 2023.

the state's electoral processes." *Id.* § 31.005(a). Additionally, he has the duty to prescribe the design and content of mail-in ballot forms and the authority to prescribe procedures for the signature-comparison procedure. *Id.* §§ 31.002; 87.0411(f); 87.0271(f).

Respondent nevertheless opposes certiorari by arguing the SOS's connection is insufficient—while ignoring or downplaying enforcement duties and authorities that connect him directly to the challenged state laws. Respondent also repeatedly implies that this Court narrowed *Young* in *Whole Woman's Health v. Jackson*, 142 S. Ct. 522 (2021), and that an officer meets *Young*'s "some connection" requirement only if he is directly responsible for administering the challenged state laws. *See, e.g.*, BIO 12–14, 15. Even if the officer is charged with supervising and directing administration by others—so that injunctive relief against him *would* redress Petitioners' injuries—Respondent maintains that it is not enough. BIO 16, 17.

There are three problems with this argument: First, nothing in *Whole Woman's Health* supports it. Although this Court rejected the plaintiffs' efforts to sue state judicial officers, all nine Justices applied *Young*'s "some connection" requirement to four executive officer defendants—with eight Justices concluding that those officers *had* a sufficient connection, at least on the record before this Court. *See* 142 S. Ct. at 533, 535–37; *id.* at 540–41 (Thomas, J., concurring in part and dissenting in part). If that decision meant to narrow the circumstances in which *Young* applies, it certainly did not say so.

Second, Respondent's position underscores how, if left intact, the decision below would make it nearly

impossible to challenge violations of federal law by state officers in any context in which enforcement responsibilities are distributed between state and local officials. Respondent's approach would also make such cases far more complex—leading to recurring disputes over relative degrees of enforcement responsibility that have nothing to do with the purpose of the "some connection" standard, *i.e.*, to separate cases in which an officer was sued merely as a proxy for the state from those in which he bore at least some measure of responsibility.

Third, even under a narrower view of *Young*, this should still be an easy case, given the SOS's enforcement responsibilities and the relief a district court could provide directly against him to redress Petitioners' injuries. *E.g.*, Pet. 30 n.11. Like the majority below, Respondent attempts to water down the SOS's role vis-à-vis local officials. But this is not a case, like *Whole Woman's Health*, in which a state has absolved its executive officers of enforcement responsibility; it is one in which the SOS is the *central* authority over a diffuse enforcement scheme.

Most significantly, none of these arguments militates against certiorari. The Petition demonstrates how the Fifth Circuit has narrowed the class of state officials to whom *Young*'s exception can apply to a far greater degree than this Court has previously sanctioned—and in direct conflict with at least five other courts of appeals. Respondent *agrees* that the Fifth Circuit applies a narrower standard; it just defends that standard by arguing that this Court *already* adopted it; and by writing out of the SOS's duties the very authorities that would suffice under *Young* in every circuit *except* the Fifth. Because the

Fifth Circuit's approach to *Young* would denude that precedent of much of its force, it should be for this Court, and not the Fifth Circuit, to decide whether it is correct.

I

In Respondent's view, this Court's decision in *Whole Woman's Health* already narrowed *Young*'s "some connection" requirement. But *Whole Woman's Health* includes no language suggesting that this Court was narrowing that requirement—and lots of language to the contrary.

In explaining why four executive licensing officials *were* proper defendants, the *Whole Woman's Health* opinion noted that each "*may* or must take enforcement actions against the petitioners" if they violate Texas's Health and Safety Code. 142 S. Ct. at 535 (emphasis added). And in responding to Justice Thomas (who would have held that none of the named defendants were proper), it stressed that the disagreement was not over changes to the underlying principles, but merely their application. *See id.* at 536–37.

Respondent nevertheless suggests, repeatedly, that *Young*'s exception does not apply to the SOS because of the day-to-day role that *local* officials play in carrying out the signature-comparison procedure. *See, e.g.*, BIO 12–14, 16–17. Even if such a principle could be divined from *Whole Woman's Health*, the doctrinal and practical ramifications of narrowing *Young*'s "some connection" requirement to require *more* than "some connection"—as Respondent essentially argues this Court already did—augurs in *favor* of this Court's intervention, not against it.

Not only would Respondent's reading of *Young* prevent federal courts from enforcing the supremacy of federal law in an alarmingly broad class of future suits; it would also cause headaches for lower courts—who, instead of having to decide only that an officer defendant bears "*some* connection" to enforcement of the challenged state law, would now have to articulate (and apply) tests for determining the appropriate degree of connectedness. Thus, insofar as Respondent argues against certiorari because local officials are primarily responsible for the front-line administration of the signature-comparison procedure, that argument rests on a narrowing of *Young* that this Court has not previously undertaken—and that it should not allow the Fifth Circuit to effectuate on its own.[2]

II

The Petition identified two grounds for granting certiorari: the importance of adhering to *Young*'s "some connection" requirement, and the extent to which the decision below, in departing from that requirement, directly conflicts with decisions of multiple other courts of appeals.

Respondent disputes the existence of a circuit split—albeit by repeatedly mischaracterizing (or omitting) the ways in which the SOS has far more than "some connection" to enforcing the signature-

[2] Respondent also claims that *Young* requires a state officer to demonstrate a "willingness to exercise [the connected] duty" to satisfy the "some connection" requirement. BIO 17–18. But this view, which was novel when first adopted by a Fifth Circuit plurality in 2001 in *Okpalobi v. Foster*, finds no support in *Young* or this Court's subsequent cases. *See* 244 F.3d 405, 448 (5th Cir. 2001) (Parker, J., dissenting).

comparison procedure. Properly understood, not only does the SOS easily surpass the "some connection" threshold, but his duties drive home the irreconcilable split between the Fifth Circuit and its sisters.

As the Petition summarized, Pet. 3–10, Petitioners' claims arise from the manner in which the SOS and local officials enforce the signature-comparison procedure. In response, Respondent takes one of three tacks: he downplays or ignores how the duties connect him to enforcement of the signature-comparison procedure; he moves the goalposts as to how *local* officials are implicated; or he wrongly claims that those arguments were waived.

For instance, Respondent asserts that the SOS's guidance is non-binding. BIO 13–14, 22. But even if that were true of his authority under Texas Election Code Section 31.004, it misses the point; the SOS is separately empowered through other statutes to issue directives and instructions to obtain and maintain uniformity with regard to the signature-comparison procedure, and, pursuant to Senate Bill 1,[3] to prescribe procedures for the signature-comparison procedure, all of which local officials *must* follow. *See* Tex. Elec. Code §§ 31.003, 87.0271(f), 87.0411(f).

Respondent portrays the uniformity provision as entirely precatory. *See* BIO 6, 13. But there is no question that the SOS has an obligation to enforce the uniformity provision by directing and instructing state and local officials—who in turn must (and do) follow his mandates. *See* Pet. App. 12a–13a

[3] Respondent does not challenge the Petition's point that Senate Bill 1's mandatory correction processes are impracticable and its remaining correction processes are discretionary. Pet. 5–6.

(Higginbotham, J., dissenting). Respondent does not *dispute* this point; he just tries to obfuscate it.

Further, Texas Election Code Section 31.005 grants the SOS the authority to issue orders to correct "offending conduct" that local officials must follow, and to determine what constitutes offending conduct and how a local official can correct that offending conduct. Although the SOS himself cannot sue to enforce his orders, the relevant point—which Respondent does not contest—is that his orders *are* enforceable. BIO 14; Pet. 24–25; *see Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 59–60, 67–68 (1963).

Finally, Respondent claims Petitioners waived their arguments relating to the SOS's additional obligations under Texas Election Code Section 31.002—specifically his duty to prescribe the design and content of forms used in the signature-comparison procedure. The waiver argument is flatly unpersuasive, as evidenced by the Fifth Circuit's consideration of the merits.[4] It is also a distraction from the point: mail-in voting is a forms-based process. The SOS prescribes the design and content of the application, the envelopes, the notices, the letters, and other documents relating to the signature-comparison procedure. *See* Pet. 8–10. And local

[4] Respondent claims that Petitioners waived their Section 31.002 argument in the district court. BIO 10, 12–13. But the Fifth Circuit analysis from which those arguments derive—first articulating the SOS's duties vis-à-vis mail-in ballots under Section 31.002—was not issued until *after* the district court's order in this case. Pet. 23 n.10. That is why the majority below felt compelled to reject this argument on the merits—largely by *distinguishing* the Fifth Circuit's decision in *Texas Democratic Party v. Abbott*, 978 F.3d 168 (5th Cir. 2020). *See* Pet. App. 8a & n.9. It is thus properly before this Court, too.

officials *must* use his forms. Tex. Elec. Code § 31.002(d).

Thus, an injunction regulating the content of forms used by the SOS to administer the signature-comparison procedure would effectively redress—or, at the very least, *help* to redress—the constitutional violations Petitioners allege. *See Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982) ("[A] plaintiff satisfies the redressability requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury.").

In sum, Respondent has the power to control how the signature-comparison procedure is—and is not—administered. And the reason why these merits-based arguments matter at the certiorari stage is not just because they demonstrate the flaws in the Fifth Circuit's analysis below; they also underscore the circuit split flagged in the Petition—insofar as they make clear that the SOS has far more than just the duty to uphold Texas law in the abstract, such as the officers in the two out-of-circuit cases Respondent claims support his position. BIO 26–27. The Texas legislature has given the SOS more-specific, overlapping, and mandatory duties that put him at the center of enforcing the signature-comparison procedure. These are insufficient to satisfy *Young* in the Fifth Circuit, and the Fifth Circuit alone.[5]

[5] Respondent necessarily concedes that the holding in the opinion below conflicts with the holdings in *Papasan v. Allain*, 478 U.S. 265, 282 n.14 (1986), and *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463, 475 n.16 (6th Cir. 2008)— both of which held that a state executive officer's general duty to oversee

III

Finally, Respondent closes by conjuring two reasons why, even if the question presented was worthy of this Court's review, this case presents a poor vehicle for resolving it: that Petitioners lack standing, and that further proceedings remain for the district court.

On standing, a proper understanding of the SOS's role in enforcing the signature-comparison procedure (as opposed to the skewed version provided by Respondent) settles beyond peradventure that Petitioners satisfy Article III's causation and redressability requirements. Indeed, the Fifth Circuit already held as much in a different case. *See OCA-Greater Houston v. Texas*, 867 F.3d 604, 613–14 (5th Cir. 2017) (quoting Tex. Elec. Code §§ 31.001, 31.003). The SOS's failure to direct and instruct local officials, create procedures, or develop forms to enforce the signature-comparison procedure in a way that comports with federal law bears a direct connection to Petitioners' alleged injuries, which the SOS can at least substantially redress.[6]

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enforcement of a statutory scheme is sufficient to satisfy *Young*'s connection requirement. BIO 16–17, 21–22.

And try as Respondent might by mischaracterizing their holdings, neither *Mo. Prot. & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803 (8th Cir. 2007) nor *Grizzle v. Kemp*, 634 F.3d 1314 (11th Cir. 2011), come anywhere close to raising the "some connection" threshold. But even if they somehow did, all that would demonstrate is that the circuit split at the heart of the Petition is even *deeper*.

[6] Respondent also asserts that Petitioner Weisfeld cannot establish an Article III injury-in-fact because the future harms she alleges are speculative, and that Petitioner Coalition of

Respondent nevertheless assumes that the only possible injunction against Respondent would be one that orders him "to advise local officials to stop complying with the signature-verification laws," despite the SOS's deep involvement in and vast authority over the signature-comparison procedure. BIO 31. Indeed, the district court *in this case* entered an injunction with far more nuance than Respondent argues (as Respondent even admits elsewhere in the BIO). BIO 9; *see* Pet. App. 218a–222a (text of injunction).

Respondent closes by suggesting that this Court's review at this juncture would be premature—asserting that the Petition arises in an "interlocutory" posture because Petitioners still have other pending claims. BIO 31–32. But the only respondent here is the SOS. And the question presented involves only whether *he* is a proper defendant to Petitioners' constitutional claims. The Fifth Circuit answered that question in the negative, conclusively resolving that issue for the purposes of those claims. If certiorari is denied, there will be no further litigation in this case against the SOS on the core claims of the suit. The only surviving claims against the SOS will be Petitioner CTD's much narrower statutory claims.

Not only is there no *need* to allow Petitioners to proceed further before resolving the question presented (and the BIO does not argue otherwise), but

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Texans With Disabilities (CTD) did not establish its "diversion-of-resources" injury. But the district court's thorough, contrary analysis on both counts, which the Fifth Circuit did not consider, came on summary judgment—and was based upon detailed factual findings that Respondent ignores, mischaracterizes, or does not contest. Pet. App. 100a–117a.

it could easily be an enormous waste of time. After all, if this Court agrees that the question presented is cert.-worthy in the abstract, it makes no sense to have this case remanded to the district court, where the SOS will *not* be a party to the core claims, only to have this Court potentially decide at some later time that he should have been.

CONCLUSION

Respondent is responsible for supervising and directing how Texas's election laws are administered by local officials, and has already exercised that authority (albeit ineffectively) with respect to the signature-comparison procedure. This case is therefore a far cry from *Whole Woman's Health*, in which Texas went out of its way to take enforcement responsibility *away* from its executive officials. Here, Texas has simply delegated some of the front-line enforcement authority to local officials, with the SOS remaining in charge of supervising and directing election administration across the state. Respondent tries to portray these cases as being the same. Certiorari is warranted in the first instance because they are not.

Writing for the Court in 2002, then-Justice Scalia explained that, "[i]n determining whether the doctrine of [*Young*] avoids an Eleventh Amendment bar to suit, a court need only conduct a 'straightforward inquiry into whether [the] complaint alleges an ongoing violation of federal law and seeks relief properly characterized as prospective.'" *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002) (quoting *Idaho v. Coeur d'Alene Tribe of Idaho*, 512 U.S. 261, 296 (1997)). As the BIO makes clear, the Fifth Circuit's decision in this case would needlessly

complicate that inquiry—in ways that would not just create newfound doctrinal muddles in suits against state officers, but that would significantly restrict the ability of citizens to vindicate the supremacy of federal law in suits against state officers who are directly, if not centrally, involved in the enforcement of the underlying state laws.

Because that understanding of *Young* would have monumental ramifications, and because it is at odds with the approach followed in at least five other circuits, Respondent's arguments in these respects underscore only why certiorari should be granted—not why it should be denied.

Respectfully submitted,

RICHARD MANCINO
JOANNA SURIANI
FERDINAND G. SUBA JR.
FREDERICK SWANSTRUM
WILLKIE FARR & GALLAGHER LLP
787 Seventh Avenue
New York, NY 10019
(212) 728-8000

HANI MIRZA
Counsel of Record
ZACHARY DOLLING
CHRISTINA M. BEELER
TEXAS CIVIL RIGHTS PROJECT
1405 Montopolis Drive
Austin, TX 78741
(512) 474-5073
hani@texascivilrightsproject.org

ERIC MAYER
ALEXANDRA FOULKES
SUSMAN GODFREY LLP
1000 Louisiana Street, Suite 5100
Houston, TX 77002
(713) 651-9366

STEPHEN I. VLADECK
727 East Dean Keeton Street
Austin, TX 78705
(512) 475-9198