No. 22-149

In the Supreme Court of the United States

ROSALIE WEISFELD AND COALITION OF TEXANS WITH DISABILITIES, PETITIONERS

v.

JOHN SCOTT, IN HIS OFFICIAL CAPACITY AS THE TEXAS SECRETARY OF STATE, ET AL.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Almost exactly a year ago, this Court—affirming the very approach used by the Fifth Circuit and decried here—described the *Ex parte Young* doctrine as a "narrow exception" to the States' sovereign immunity "grounded in traditional equity practice . . . that allows certain private parties to seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 532 (2021) (citing *Ex parte Young*, 209 U.S. 123, 159-60 (1908)). To fit within that narrow exception, "the petitioners [must] direct this Court to any enforcement authority the [named defendant] possesses in connection with [the particular statute challenged] that a federal court might enjoin him from exercising." *Id.* at 533. Without even citing *Whole Woman's Health* in the body of their petition, petitioners insist that *Ex parte Young* permits them to bring a suit against Texas's Secretary of State to challenge the validity of Texas's signature-verification process for mail-in ballots. The question presented is:

Whether petitioners—who admit (at 1) that the "provisions within that scheme . . . are carried out day-to-day by local officials" rather than the Secretary—have met their burden of demonstrating that the Secretary is an appropriate *Ex parte Young* defendant by pointing to the Secretary's authority to design forms used by and provide certain guidance and directives to those local officials.

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INTRODUCTION

Petitioners seek to enjoin Texas's signature-verification laws for mail-in voting on the grounds that they are facially unconstitutional. But as this Court reaffirmed just last Term, courts cannot enjoin laws: "[c]onsistent with historical practice, a federal court exercising its equitable authority may enjoin named defendants from taking specified unlawful actions" but cannot enjoin the "laws themselves." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 535 (2021). The Fifth Circuit concluded that this "narrow exception" to state sovereign immunity, *id.* at 532, did not apply in this instance because petitioners had not identified any ongoing action by the named defendant (Texas's Secretary of State) to enforce the challenged law (Texas's signature-verification laws) the cessation of which would cure petitioners' alleged injury.

Petitioners admit the factual predicate of the Fifth Circuit's decision, namely that "local officials carry out [the signature-verification] provisions day-to-day." Pet i. And rather than dispute the Fifth Circuit's articulation of the *Ex parte Young* doctrine here, petitioners complain about prior Fifth Circuit decisions: "[b]eginning with *Okpalobi v. Foster*, 244 F.3d 405 (5th Cir. 2001) [(en banc)], the Fifth Circuit has misapplied this Court's precedent and weakened the role played by *Young* in vindicating the supremacy of federal rights." Pet. 25. Petitioners fail to mention, however, that in reaching the conclusion below, the Fifth Circuit applied the same rule that this Court ultimately vindicated just last Term. Pet. App. 6a-9a; *see Whole Woman's Health v. Jackson*, 13 F.4th 434, 442 (5th Cir. 2021) (applying inter alia *Okpalobi*).

None of the cases or arguments raised in the petition demonstrates a need for the Court to revisit the Fifth Circuit's standard under *Ex parte Young* for a second time in under two years. And even if such a need existed, this would be a poor vehicle to do so as petitioners lack standing. The Court should deny the petition.

STATEMENT

I. Statutory Background

A. Local officials' role in voting by mail in 2020

1. As petitioners repeatedly acknowledge (*e.g.*, at i, 1, 3-6), local officials are responsible for implementing Texas's election laws. A local presiding judge is "in charge of and responsible for the management and conduct of the election at the polling place," Tex. Elec. Code § 32.071, with the assistance of his clerks, *id.* § 32.031. Local district and county attorneys prosecute violations of election laws. TEX. CONST. art. V, § 21.

The signature-verification process for mail-in voting challenged here is managed by the early-voting clerk, early-voting ballot board, and potentially a precinct's signature-verification committee.[1] The early-voting clerk is typically the county clerk, Tex. Elec. Code § 83.002, but may be another local official depending on the type of election, *id.* §§ 83.003-.007. The early-voting ballot board is composed of individuals appointed by the county election board or other local authority. *Id.* §§ 87.002(c), .004. And the signature-verification committee, if it exists, is composed of members who are appointed by the relevant local authority. *Id.* § 87.027(d).

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[1] Unless a signature-verification committee is requested by a set number of voters, each early-voting clerk has discretion whether to appoint such a committee. Tex. Elec. Code § 87.027(a), (a-1).

2. To vote by mail, a voter must apply to the early-voting clerk in his precinct. *Id.* §§ 84.001(a), .007. The application must contain the voter's signature and certify that "the information given in this application is true." *Id.* §§ 84.001(b), .011(a)(1). A witness may sign for a voter with disabilities or who is unable to read. *Id.* § 1.011.

If the voter is eligible to vote by mail, the early-voting clerk mails the voter the necessary materials: a "Dear Voter" letter containing relevant instructions, the ballot, ballot envelope, and carrier envelope. *Id.* §§ 86.001(a), (b); 86.002(a); 86.003(a); ROA.5380.[2] The voter marks the ballot, places the ballot in the ballot envelope, and places the ballot envelope in the carrier envelope. Tex. Elec. Code § 86.005(a), (c). The voter also signs a certificate across the flap of the carrier envelope, certifying that the enclosed ballot represents the voter's wishes "independent of any dictation or undue persuasion." *Id.* § 86.013(c); *see also id.* § 86.005(c). The voter then submits the carrier envelope containing the ballot to the early-voting clerk by mail, common carrier, or in person. *Id.* § 86.006(a).

3. After submission, it is the task of the early-voting ballot board and (where it exists) the signature-verification committee to determine whether someone other than the voter signed the mail-in ballot application or carrier envelope.[3] *Id.* §§ 87.027(i), .041(b)(2). When this lawsuit was filed, the board and the committee could also consider signatures of the voter that were "made within

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[2] "ROA" refers to the paginated record filed with the Fifth Circuit.

[3] For certain voters in the armed forces or living abroad, the signatures may be on different documents. *Id.* §§ 86.011(b), 87.041(f).

the preceding six years and on file with the county clerk or voter registrar" when determining whether the signatures were the voter's. *Id.* § 87.041(e). Unless a signature-verification committee exists, the early-voting ballot board determines whether to accept the ballot. *Id.* § 87.041(a). If there is a signature-verification committee, a ballot is accepted unless *both* the board and the committee agree it should be rejected. *Id.* § 87.027(i).

If a ballot is rejected, the presiding judge is required to deliver written notice of the reason for the rejection to the voter not later than the tenth day after election day. *Id.* § 87.0431(a).

If a county election officer believes a ballot was incorrectly rejected by the early-voting ballot board, he may petition a district court for injunctive or other relief any time before the election is officially canvassed. *Id.* § 87.127(a). In addition, improperly rejected ballots may be grounds for an election contest. *See, e.g.*, *Reese v. Duncan*, 80 S.W.3d 650, 660-62 (Tex. App.—Dallas 2002, pet. denied). It is also a crime for a board member intentionally to accept a ballot that does not comply with the law. Tex. Elec. Code § 87.041(g).

B. Changes to signature-verification during the pendency of the appeal

While this case was pending before the Fifth Circuit, the Texas Legislature passed an omnibus election-reform bill that made several changes to the signature-verification process that potentially affect this case. Act of Sept. 1, 2021, 87th Leg., 2d C.S., ch. 1, 2021 Tex. Sess. Law Serv. 3783.

First, Texas law now requires a voter to include certain identifying information (*e.g.*, a driver's license number) in a spot on the carrier envelope that is hidden when sealed. Tex. Elec. Code § 86.002(g). And it creates a

rebuttable presumption that the signatures on the mail-in-ballot application and carrier envelope belong to the voter if that information matches the voter's registration. *Id.* § 87.041(d-1).

Second, Texas law now has a notice-and-cure process for voters whose mail-in ballots are rejected. Tex. Elec. Code §§ 87.0271, .0411. If the early-voting ballot board or signature-verification committee discovers the defect in time to cure it before the polls close, the early-voting ballot board or signature-verification committee must return the carrier envelope to the voter by mail within two business days. *Id.* §§ 87.0271(b), .0411(b). If there is insufficient time, the voter may be notified by telephone or email and can either (1) cancel the mail-in ballot, or (2) correct the defect in person within six days after the election. *Id.* §§ 87.0271(c), .0411(c).

Third, early-voting ballot boards and signature-verification committees may also consider any known signature on file with the county clerk or voter registrar to determine if the voter submitted the mail-in ballot application and carrier envelope. *Id.* §§ 87.027(i), .041(e).

C. Texas's Secretary of State

The Texas Secretary of State is a constitutionally created office in the executive branch. TEX. CONST. art. IV, § 1. He is appointed by the Governor, has constitutional obligations regarding the recording of governmental proceedings and the publication of laws, and is to "perform such other duties as may be required of him by law." *Id.* § 21.

1. One of the Secretary's statutory duties is to serve as Texas's "chief election officer," Tex. Elec. Code § 31.001(a), but that designation is not "a delegation of authority to care for any breakdown in the election process," *Bullock v. Calvert*, 480 S.W.2d 367, 372 (Tex. 1972)

(orig. proceeding). *Accord In re Hotze*, 627 S.W.3d 642, 649 (Tex. 2020) (orig. proceeding) (Blacklock, J., concurring) (reaffirming that *Bullock* remains good law). Rather, the Secretary's role is effectively as an information resource, who helps promote uniformity across local election authorities throughout Texas's 254 counties by designing election forms, providing guidance regarding the interpretation of election laws, and assisting those authorities who actually implement the Texas Election Code. Tex. Elec. Code §§ 31.002-.004.

Petitioners are correct (at 24-25) that the Secretary is empowered to direct a person performing election-related administrative functions to cease engaging in unlawful conduct that impedes a citizen's voting rights. *Id.* § 31.005(a), (b). But failure to follow such directives carries no penalties. *See id.* The Secretary's only recourse is to refer the issue to the Attorney General, who retains discretion whether to bring suit to enforce the underlying law. *Id.* § 31.005(c).

2. With respect to the signature-verification process, the Secretary has designed the mail-in ballot application, "Dear Voter" letter, ballot, envelopes, and rejection letter. *E.g.*, ROA.610-16, 1076. As dictated by Texas statute, the mail-in ballot application requires the voter to provide his signature after affirming that the information in the application is true, ROA.613, and the carrier envelope contains a signature line after the voter affirms his choice was made independent of dictation or undue persuasion, ROA.1076. Because these requirements are imposed by statute, Tex. Elec. Code §§ 84.011(a)(1), 86.013(c), the Secretary has no discretion to deviate from them. *Contra* Pet. 30 n.11 (suggesting Secretary could eliminate signature lines).

To assist local authorities, the Secretary has also created a handbook describing the obligations of early-voting ballot boards and signature-verification committees. ROA.556-605. The Secretary also periodically issues advisories to explain the requirements of Texas law regarding mail-in voting. ROA.5380-85. As of 2021, the Secretary may prescribe procedures regarding the notice-and-cure process, and he has issued an advisory to that effect. Tex. Elec. Code §§ 87.0271(f), .0411(f); Appellant's Rule 28(j) Letter Ex. B, *Richardson v. Tex. Sec'y of State*, No. 20-50774 (5th Cir. Feb. 18, 2022).

II. Procedural History

A. District court

1. Petitioners are Rosalie Weisfeld, an individual whose mail-in ballot was rejected by a local early-voting ballot board in 2019, ROA.1081, and the Coalition of Texans with Disabilities (CTD), a nonprofit organization that advocates on behalf of people with disabilities, ROA.33. Together with another individual and several organizations, they challenged the signature-verification laws on a variety of constitutional and statutory theories. ROA.27-52.

Plaintiffs named as defendant the Texas Secretary of State[4] and two local officials, ROA.38, but asked the district court to enjoin not only the named defendants, but the State, 254 county agencies, and all political subdivisions that carry out elections, ROA.50. They sought an injunction either (1) prohibiting enforcement of the signature-verification laws, or (2) requiring reasonable

[4] The original defendant was Ruth Hughs. In 2021, she was succeeded by Secretary John Scott, who will himself be succeeded by state Senator Jane Nelson at the start of next year.

notice of a signature defect and an opportunity to cure. ROA.50, 5260-67.

B. All parties moved for summary judgment. Pet. App. 92a-93a. Due to the upcoming 2020 election, the district court issued a partial permanent injunction, addressing only two plaintiffs (petitioners here), one defendant (the Secretary), and two of the plaintiffs' four claims. Pet. App. 84a, 96a-97a. The remaining claims and parties remain before the district court. Pet. App. 84a n.1. Although the district court identified only two wrongly rejected ballots, Pet. App. 89a-90a, it concluded that the signature-verification laws facially violated procedural due process and placed an undue burden on the right to vote. Pet. App. 137a-87a.

In addressing jurisdiction, the court found that Weisfeld had standing because she planned to vote by mail in the future and once had a mail-in ballot rejected during the signature-verification process. Pet. App. 100a-05a. The court also concluded that CTD had standing based on a diversion-of-resources theory. Pet. App. 105a-17a. The court found these injuries traceable to the Secretary because of his general duty to maintain uniformity in the application of election laws, his past issuance of advisories, and his discretion to take "appropriate action" to protect voting rights. Pet. App. 117a-23a (citing Tex. Elec. Code §§ 31.001-.005).

Regarding sovereign immunity, the district court recognized that the Secretary has no role in reviewing signatures, sending rejection notices, or bringing a suit under section 87.127 to contest wrongly rejected ballots—those are all duties of local election officials. Pet App. 128a-29a. Nevertheless, the district court believed the Secretary's general authority to issue advisories and

orders was a sufficient connection to the enforcement of the signature-verification laws. Pet. App. 124a-30a.

Unsurprisingly given the Secretary's limited informational function, the district court crafted an injunction that did not enjoin any unconstitutional conduct by the Secretary. Pet. App. 194a-200a. Instead, the district court required the Secretary to send advisories to all local election officials that they must either (1) accept mail-in ballots regardless of the signature-verification laws, or (2) both notify the voter if his ballot is rejected and file a legal challenge under section 87.127 if the voter claims the rejection was erroneous and wants a challenge filed. *Id.* The court also required the Secretary to "order" any non-compliant election officials to correct their offending conduct. Pet. App. 200a.[5]

B. Court of appeals

In a 2-1 ruling, a merits panel of the Fifth Circuit concluded that sovereign immunity barred petitioners' claims because the Secretary lacked the connection to the enforcement of the signature-verification laws required by *Ex parte Young*. Pet. App. 1a-10a.[6] The majority first explained that the process of signature verification was entirely in the hands of local officials—the early-

[5] The district court subsequently issued an "Order of Clarification," Pet. App. 70a-82a, but the Fifth Circuit determined the clarification was not before it, Order, *Richardson v. Tex. Sec'y of State*, No. 20-50774 (5th Cir. Sept. 16, 2020).

[6] The Fifth Circuit granted the Secretary's emergency motion for a stay pending appeal, Pet. App. 20a-64a, in part because the district court likely ordered a form of relief not available under *Ex parte Young*, Pet. App. 59a-62a. That question appears to be outside the scope of the question presented regarding whether the Secretary was a proper defendant under *Ex parte Young*. It does, however, reflect an alternative ground for affirming the decision below.

voting clerk, early-voting ballot board, and signature-verification committee. Pet. App. 6a. As petitioners do not contest, the Secretary had no day-to-day implementation role. *Id.*

The majority then held that there must be a "connection to the enforcement of the particular statutory provision that is the subject of the litigation" and that the Secretary's broad duties did not establish that connection. Pet. App. 7a. Addressing those duties, the majority held that petitioners had waived any argument regarding the Secretary's duty to design forms by failing to make the argument in the district court. Pet. App. 8a; Tex. Elec. Code § 31.002. Even so, the majority rejected section 31.002 as a source of an enforcement connection because petitioners were not challenging the design of the forms used in the verification process but were challenging the process itself. Pet. App. 8a. Enjoining the Secretary to alter the forms would not have eliminated the obligation of local officials to follow the signature-verification laws. *Id.*

Applying the Fifth Circuit's decade-old rule that to "enforce" a law requires a party to be able to "compel or constrain" compliance with that law, the majority also rejected arguments that the Secretary has the necessary enforcement connection to the entire Election Code merely because he can issue advisories and offer advice to local officials. Pet. App. 9a. After all, giving advice does nothing to "compel or constrain" local officials. *Id.* Finally, the majority concluded the fact that the Secretary once wrote a letter to a Harris County election official about a different election law, even if considered enforcement, did not show his intent to enforce the signature-verification requirement here. *Id.*

Judge Higginbotham dissented, arguing that the majority had improperly narrowed *Ex parte Young*, that the arguments were more properly considered in the context of standing, and that the Secretary's obligation to maintain uniformity in the interpretation of election laws sufficiently tied him to the signature-verification provisions. Pet. App. 11a-19a.

REASONS FOR DENYING THE PETITION

I. The Fifth Circuit's Decision Was Both Correct and Consistent with this Court's Case Law.

Ex parte Young created a "narrow exception" to a State's sovereign immunity for suits to prevent state officials from enforcing unconstitutional laws. *Whole Woman's Health*, 142 S. Ct. at 532. The theory underlying this exception is that the enforcement of an unconstitutional law is "without the authority of" the State and "does not affect[] the state in its sovereign or governmental capacity." *Ex parte Young*, 209 U.S. 123, 159 (1908). A state official attempting to enforce an unconstitutional law is therefore "stripped of his official or representative character" and subjected to suit. *Id.* at 160. Consequently, "a suit challenging the constitutionality of a state official's action is not one against the State." *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 102 (1984).

But if the enforcement of an unconstitutional statute is what strips a state official of his sovereign immunity, that official must be able to enforce the statute before he can be a proper defendant. Because the Secretary lacks the ability to actually enforce Texas's signature-verification laws, the Fifth Circuit's decision that he remains immune is consistent with and does nothing to undermine this Court's precedent.

A. The Fifth Circuit correctly concluded that the Secretary does not enforce Texas's signature-verification laws.

As explained in *Ex parte Young*, the requisite connection to enforcement can arise from the challenged statute itself or from general law, but that connection must exist. 209 U.S. at 157. This Court reaffirmed that limitation on *Ex parte Young* a year ago this month. *Whole Woman's Health*, 142 S. Ct. at 534 (ordering Texas's Attorney General dismissed from a suit notwithstanding his general duties regarding Texas law).

Here, petitioners do not deny that the signature-verification laws are implemented by local officials and may be enforced by local officials through challenges to rejected ballots under Texas Election Code section 87.127 and prosecutions for intentionally accepting noncompliant ballots under section 87.041(g). Instead, they base their arguments entirely on the Secretary's general duties. Pet. 6-9, 18-19, 22-25. But the Fifth Circuit properly held that "[n]one of the general duties cited by the district court shows that the Secretary enforces the particular verification provisions challenged here." Pet. App. 7a-8a. This Court does not need to grant review to reject petitioners' argument.

Section 31.001: As the Texas Supreme Court has held, under Texas law, the Secretary's title of "chief election officer" is not "a delegation of authority to care for any breakdown in the election process." *Bullock*, 480 S.W.2d at 372; *see In re Hotze*, 627 S.W.3d at 649 (Blacklock, J., concurring). And it certainly conveys no authority to enforce the signature-verification laws.

Section 31.002: The Secretary's authority to design forms used for elections is also insufficient for at least three reasons. *First*, the Fifth Circuit properly held that

petitioners—who had the burden to establish jurisdiction—waived any reliance on section 31.002 by failing to raise it in the district court. Pet. App. 8a. Although making passing reference to Secretary-provided forms, petitioners never cited section 31.002 as a source of the Secretary's enforcement authority. ROA.178-79 n.5, 2184 n.35. Nor was changing the design of mail-in voting forms part of the six-step plan for relief that petitioners proposed to the district court. ROA.5260-67.

Second, as the Fifth Circuit properly held, petitioners do not complain about the Secretary's design of the application for a mail-in ballot or the carrier envelope. Pet. App. 8a. Indeed, the signatures on those forms serve the independent purposes of affirming that the voter's statements in the application are true and that the voter's ballot was not the result of undue persuasion. Tex. Elec. Code §§ 84.011(a)(1), 86.013(c). The design of the forms, which is all the Secretary controls, is not the alleged constitutional problem—only what local officials do with them.

Third, because they do not act in concert with the Secretary, non-party local election officials would not be bound by the district court's judgment. Fed. R. Civ. P. 65(d)(2). Thus, petitioners' newfound theory that the Secretary can be enjoined to remove the signature lines from the application for mail-in ballot and carrier envelope, Pet. 30 n.11, would not eliminate local officials' statutory obligations to follow Texas's signature-verification laws. *See* Tex. Elec. Code §§ 87.027(i), .041(b)(2).

Sections 31.003 & .004: Preparing directives, instructions, or advice to encourage uniformity in the interpretation and application of election laws is not enforcement authority, either. It is merely giving a nonbinding opinion about Texas's election laws that local

election officials may choose to follow or not follow. *See, e.g.*, *In re Stalder*, 540 S.W.3d 215, 218 (Tex. App.—Houston [1st Dist.] 2018, no pet.); *see also McBurney v. Cuccinelli*, 616 F.3d 393, 400 (4th Cir. 2010) (duty to issue advisory opinions is not enforcement). Indeed, that is the reason for section 31.005(c), which allows the Attorney General to take action against election officials who violate state law.

Section 31.005: The Secretary's discretion to issue orders to officials to protect voting rights does not create a connection to the enforcement of the signature-verification laws. As this Court explained in *Ex parte Young* itself, "[t]here is no doubt that the court cannot control the exercise of the discretion of an officer." 209 U.S. at 158. Rather, a court can "only direct affirmative action where the officer having some duty to perform not involving discretion, but merely ministerial in its nature, refuses or neglects to take such action." *Id.*

Neither section 31.005 nor any other provision of Texas law imposes a ministerial obligation on the Secretary to independently assess the constitutionality of state election laws and then order election officials to follow or not follow the laws accordingly. *See In re Hotze*, 627 S.W.3d at 649 (Blacklock, J., concurring). And, even if he could, local officials are not bound by the Secretary's orders and have been known to ignore them, as petitioners implicitly acknowledge (at 9 n.7). *See State v. Hollins*, 620 S.W.3d 400 (Tex. 2020) (per curiam). Such a discretionary duty to issue precatory orders, enforceable only by an independently elected constitutional officer, is hardly enough to justify stripping the Secretary of his sovereign status within the meaning of *Ex parte Young*.[7]

[7] The Court should disregard petitioners' reliance (at 24) on non-record evidence of a non-party's fear of an enforcement action.

B. Petitioners' authority is not to the contrary.

Petitioners nevertheless attempt to manufacture a cert-worthy issue by asserting a direct conflict with two of this Court's decisions, Pet. 20-25, and tension that allegedly undermines the *Ex parte Young* doctrine, Pet. 25-31. Not so. That petitioners disagree with the Fifth Circuit's assessment of the Secretary's statutory duties does not establish an "important federal question" that warrants this Court's attention. *See* Sup. Ct. R. 10(c).

1. There is no direct conflict between the Fifth Circuit decision and this Court's precedent.

In asserting a conflict with this Court's authority, petitioners largely ignore *Whole Woman's Health*, the Court's most recent statement of the *Ex parte Young* doctrine, citing it only once in setting out the question presented. Instead, they rely on *Ex parte Young* and *Papasan v. Allain*, 478 U.S. 265 (1986). Neither supports petitioners' position.

a. Despite claiming that the Fifth Circuit's decision is in direct conflict with *Ex parte Young* itself, Pet. 20-21, petitioners do not identify any actual conflict. In *Ex parte Young*, Minnesota's attorney general had a statutory duty to institute proceedings against corporations that violated the law, was obligated to bring suits on behalf of the railroad commission, and had, in fact, brought suit to enforce the allegedly unconstitutional law. 209 U.S. at 160-61. Under those circumstances, the Court concluded that the Attorney General was "proceeding

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Reliance on non-record evidence is a "manifestly improper" litigation tactic. Stephen M. Shapiro et al., Supreme Court Practice 801 (10th ed. 2013); *see also Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 n.16 (1970).

without the authority of . . . the state in its sovereign or governmental capacity." *Id.* at 159. But the Court carefully cabined its rule, requiring the named defendant to have "some connection with the enforcement of the act." *Id.* at 157. To have such a connection, an individual was required to be "clothed with some duty in regard to the enforcement of the laws of the state," *and* must "threaten and [be] about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act." *Id.* at 155-56. Absent those two circumstances, the Court explained, a plaintiff is "merely making him a party as a representative of the state, and thereby attempting to make the state a party." *Id.* at 157.

The facts that stripped the Minnesota Attorney General of his sovereign capacity are absent here. Petitioners, a voter and an advocacy organization, do not complain that the Secretary might bring proceedings against *them*. Rather, they complain of a more indirect form of enforcement—that the Secretary controls the local officials who do implement the laws by (1) advising local officials how to apply the laws, and (2) taking action against local officials who do not apply the laws. Pet. 22, 24-25. But *Ex parte Young* does not concern such indirect enforcement, and accordingly, the Fifth Circuit's ruling does not conflict with it.

2. Petitioners' reliance (at 21-22) on *Papasan* fares no better. Leaving aside any evolution in this Court's jurisprudence regarding both sovereign immunity and standing since *Papasan*, it concerned a constitutional challenge to the distribution of funds from lands held in trust by Mississippi. 478 U.S. at 267-68. Mississippi law provided that the board of education, acting under the "general supervision" of the Mississippi Secretary of

State, had "control and jurisdiction of said school trust lands and of all funds arising from any disposition thereof." Miss. Code § 29-3-1(1); *Papasan*, 478 U.S. at 282 n.14. The Court concluded that if the Secretary acted unconstitutionally in that role, he could be enjoined. *Papasan*, 478 U.S. at 282 n.14.

But Texas's Secretary does not have "general supervision" over local election officials as they carry out the signature-verification process. He may provide instructions and advice and even send a letter directing local officials to cease violating his view of the Texas's election laws. Tex. Elec. Code §§ 31.003-.004, .005(a). But he cannot force local officials—let alone voters—to accept that view. Instead, because local officials are bound by Texas election laws, the Attorney General is empowered to enforce compliance through the Texas court system. *Id.* § 31.005(c). Because the Secretary does not generally supervise the thousands of election officials in Texas, the Fifth Circuit's ruling does not conflict with *Papasan*.

2. The Fifth Circuit's decision does not undermine *Ex parte Young*.

Perhaps recognizing that the Fifth Circuit's decision is not in direct conflict with any decisions of this Court, petitioners also claim that it "undermines" the *Ex parte Young* rule. Pet. 25-31. But their arguments focus almost entirely on *other* decisions from the Fifth Circuit—not this one. And contrary to petitioners' claims, the Fifth Circuit's precedent furthers the principles of *Ex parte Young*.

1. Petitioners first fault the Fifth Circuit for stating in a different case in which this Court has already denied certiorari that "the plaintiff *at least must* show the defendant has 'the particular duty to enforce the statute in question and a demonstrated willingness to exercise that

duty.'" Pet. 27 (quoting *Tex. Democratic Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020), *cert denied* 141 S. Ct. 1124 (2021) (*TDP*) (emphasis in petition)). Petitioners claim this is a "*heightened*" standard that erroneously narrows *Ex parte Young*'s application. Pet. 27.

But the Fifth Circuit's description of what *Ex parte Young* requires is no different than what this Court said in *Ex parte Young* itself: limiting the exception to officials who have "some duty in regard to the enforcement of the laws of the state" and who have "threaten[ed] and are about to commence proceedings, either of a civil or criminal nature, to enforce" the allegedly unconstitutional law. 209 U.S. at 155-56. Indeed, the Fifth Circuit drew its description directly from that language in *Ex parte Young*. *Okpalobi*, 244 F.3d at 416 (plurality op.) (quoting *Ex parte Young*, 209 U.S. at 155-56).

Petitioners also claim that the Fifth Circuit's statement (again, in different cases) that *Ex parte Young* requires a provision-by-provision analysis was rejected by seven Justices in *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 280 (1997). Pet. 27-28 (citing *TDP*, 978 F.3d at 179 and *Mi Familia Vota v. Abbott*, 977 F.3d 461, 468-69 (5th Cir. 2020)). But the approach that the seven Justices disclaimed was a case-by-case "balancing of state and federal interests" in each *Ex parte Young* suit. *Coeur d'Alene Tribe*, 521 U.S. at 280 (Kennedy, J.) (referring to a "case-by-case approach"); *id.* at 293-94 (O'Connor, J., concurring in part); *id.* at 297 (Souter, J., dissenting). The Fifth Circuit has never adopted a case-by-case balancing approach. And here, it asked whether petitioners had made a "showing of the Secretary's 'connection to the enforcement of the particular statutory provision that is the subject of the litigation.'" Pet. App. 7a (quoting *TDP*, 978 F.3d at 179).

The type of provision-by-provision analysis applied by the Fifth Circuit predates *Ex parte Young*, and this Court reaffirmed its vitality just last year. For example, in *Fitts v. McGhee*, state officials who could indict individuals for charging unauthorized or unreasonable tolls were not proper defendants in a challenge to a separate law that permitted private parties to bring suit to collect tolls that exceeded a statutory limit. 172 U.S. 516 (1899) (described in *Ex parte Young*, 209 U.S. at 156). Similarly, the Court held that the Texas Attorney General was not a proper *Ex parte Young* defendant in a suit challenging Texas's Senate Bill 8, which provided only for private enforcement against abortion providers, despite the Attorney General's ability to enforce other laws against abortion providers. *Whole Woman's Health*, 142 S. Ct. at 534. Thus, the authority to enforce other, even similar laws does not translate to an enforcement connection to a law that is not enforced by the state official.

By looking for an enforcement connection between the statutes granting the Secretary general authority and the signature-verification laws, the Fifth Circuit's decision does not undermine *Ex parte Young* but puts its principles into practice. After all, it was *Ex parte Young* that noted that though it "would be a very convenient way for obtaining a speedy judicial determination of questions of constitutional law" to allow suit against a state official with generalized enforcement authority, "it is a mode which cannot be applied to the states of the Union consistently with the fundamental principle that they cannot, without their assent, be brought into any court at the suit of private persons." 209 U.S. at 157.

2. Petitioners also complain (at 29-31) that the Fifth Circuit's decision improperly conflates the *Ex parte Young* analysis with the redressability prong of

standing. Assuming that is even an error, correcting it would not aid petitioners: they bear the burden to demonstrate federal-court jurisdiction. *E.g.*, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2207 (2021). In this instance, that requires them to show *both* standing and a route around sovereign immunity. But the Fifth Circuit has correctly recognized that there is "significant overlap" between standing and the analysis required by *Ex parte Young*. *E.g.*, *Air Evac EMS, Inc. v. Tex. Dep't of Ins., Div. of Workers' Comp.*, 851 F.3d 507, 520 (5th Cir. 2017).

The ability of the court to afford relief has always been part of the *Ex parte Young* analysis. If the only relief available is retrospective monetary relief, sovereign immunity bars the suit. *Edelman v. Jordan*, 415 U.S. 651, 677 (1974). And if the relief requested would control a state officer's exercise of discretion, sovereign immunity would also not permit the suit. *Ex parte Young*, 209 U.S. at 158. Thus, the *Ex parte Young* analysis focuses on cases "in which the relief against the state official directly ends the violation of federal law as opposed to cases in which that relief is intended indirectly to encourage compliance with federal law." *Papasan*, 478 U.S. at 277-78.

In that vein, the Fifth Circuit's analysis merely treats the inability to obtain effective relief against a state official as evidence that the state official lacks the ability to enforce the law. *E.g.*, *Mi Familia Vota*, 977 F.3d at 468. This is key in cases, such as this one, in which the Secretary does not directly enforce the law against the petitioners but allegedly has control over those who do. If an injunction of the Secretary would not stop the constitutional violation, then the Secretary does not enforce the statute. This is not a limitation of *Ex parte Young*, but an

application of its principle that the right defendant be enjoined.

II. The Fifth Circuit's Decision Does Not Implicate a Circuit Split.

As with its claim of a direct conflict with decisions of this Court, petitioners' asserted circuit split is illusory. Pet. 14-20. The circuits have not held that "a state official's general duties to oversee the entirety of a state's relevant statutory scheme . . . [are] enough under *Young* to connect them to a challenged provision within that scheme." Pet. 18. Instead, the circuits identify specific connections to enforcement of the challenged laws. Because the Secretary lacks that statutory connection to enforcement, the Fifth Circuit's decision is not in conflict with those identified by petitioners.

A. Petitioners' election-related cases are consistent with the Fifth Circuit's decision.

Petitioners begin (at 14-18) with cases involving the secretaries of state for other States. But States vary on how they organize elections, and those cases all find a greater connection to enforcement than is present here.

Sixth Circuit: The Sixth Circuit's decision in *League of Women Voters of Ohio v. Brunner* is unique because the plaintiffs did not challenge a specific statute enforced by a specific official but instead asserted that Ohio's entire election system suffered from "non-uniform standards, processes, and rules, . . . employs untrained or improperly trained personnel, and . . . has wholly inadequate systems, procedures, and funding." 548 F.3d 463, 466 (6th Cir. 2008). The court allowed a claim for those systemic failures against Ohio's Secretary of State as the "chief election officer," concluding he had the authority to control and the duty to train local election officials. *Id.*

at 475 n.16, 476. The Sixth Circuit's sparse connectedness analysis cannot be divorced from the unique nature of the systemic claim—a claim that petitioners have not pressed here. Pet. App. 84a.[8]

The Sixth Circuit's decision in *Russell v. Lundergan-Grimes* does not conflict with the Fifth Circuit's ruling, either. 784 F.3d 1037 (6th Cir. 2015). There, the plaintiff challenged an electioneering statute that specifically tasked Kentucky's State Board of Elections with creating exceptions to the general electioneering ban. *Id.* at 1043 (discussing Ky. Rev. Stat. § 117.235(3)). Kentucky's Secretary of State was the chair of the State Board of Elections which was "actively involved with administering the statute." *Id.* at 1048. The State's Attorney General also had statutory authority to "prosecute violations of the election laws." *Id.* at 1047 (quoting Ky. Rev. Stat. § 15.242). The Sixth Circuit found the necessary enforcement connection because the Board had created at least one exception to the statute by regulation, trained state and local personnel, and regularly partnered with the Attorney General to address improper election activity. *Id.* Here, the Secretary cannot create exceptions to the statutory signature-verification requirements. And he offers guidance, instructions, and advice, not legally binding rules. Tex. Elec. Code § 31.004.

Eighth Circuit: *Missouri Protection and Advocacy Services, Inc. v. Carnahan* addressed Missouri's rules barring individuals under court-ordered guardianship due to mental incapacity from voting. 499 F.3d 803, 805-06 (8th Cir. 2007). Although the court noted that

[8] For the avoidance of doubt, the Secretary does not concede that such a cause of action would be permissible, but that is a question for another day as it does not implicate the *Ex parte Young* analysis presented here.

Missouri's Secretary of State was "the chief state election official" of the State, its holding that the Secretary had the necessary enforcement connection hinged on the Secretary's specific statutory responsibility to send to local election authorities a list of those individuals adjudged incapacitated (and thus who could not vote). *Id.* at 807 (citing Mo. Rev. Stat. § 115.195.3). There is no such statutory role for the Secretary here, as he does not tell local election officials which ballots to accept and reject under the signature-verification laws.

Eleventh Circuit: The challenged law in *Grizzle v. Kemp* prohibited individuals from serving on local boards of education if a close relative held a position of authority within the local school system. 634 F.3d 1314, 1316-17 (11th Cir. 2011). Georgia's Secretary of State is the chairperson of the State Election Board, which is charged with enforcing Georgia's election code. *Id.* at 1319. Not only could that Board issue orders "directing compliance with" Georgia election law, it could also impose civil penalties, issue public reprimands, order restitution, and assess costs after "appropriate proceedings." Ga. Code § 21-2-33.1. Texas's Secretary can issue directives that an official is violating state law, but they are neither self-enforcing nor enforceable by the Secretary through the imposition of penalties, restitution, or costs. Tex. Elec. Code § 31.005.

The Eleventh Circuit's decision in *Democratic Executive Committee of Florida v. Lee* addressed a signature-verification law, but it does not create a circuit split because of its procedural posture. 915 F.3d 1312 (11th Cir. 2019). In ruling on a request for an emergency stay, the court noted that Florida's Secretary of State was the State's chief election officer "with the authority to relieve the burden on Plaintiffs' right to vote." *Id.* at 1318. But

the Secretary's authority had been raised neither by the private party's stay motion, *id.* at 1317, nor by the Secretary in his response to the motion for preliminary injunction, Resp. in Opp'n to Mot. for TRO & Prelim. Inj., *Democratic Exec. Comm. of Fla. v. Detzner*, No. 4:18-CV-00520-RH-MJF (N.D. Fla. Nov. 10, 2018), ECF No. 22. Thus, at most, the question of the Secretary's authority "merely lurk[ed] in the record, neither brought to the attention of the court nor ruled upon," and anything the court may have implied about the issue is "not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004).[9]

If anything, the Eleventh Circuit's binding authority suggests that it would agree with the Fifth Circuit's rule. In *Jacobson*, the court examined a claim based on the order candidates are placed on the ballot, which (as in Texas) are printed by local officials. 974 F.3d at 1253. In the context of a standing analysis, the Court held the Secretary was not the appropriate defendant because local authorities were *not* subject to the Secretary's control—notwithstanding his position as "chief election officer" with "general supervision and administration of election laws." *Id.* at 1253-54.

In sum, none of these cases establish a circuit split implicated by the Fifth Circuit's decision here.

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[9] As petitioners acknowledge, the opinion may also not be considered binding in the Eleventh Circuit because it was decided in a stay posture. Pet. 17 n.8 (citing *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1256 (11th Cir. 2020)).

B. Petitioners' non-election cases are consistent with the Fifth Circuit's decision.

Petitioners offer up two non-election-related cases as further evidence of a split, but in those cases, the state official had clear control over the enforcement of the challenged law.

Second Circuit: In *CSX Transportation, Inc. v. New York State Office of Real Property Services*, the Second Circuit considered who was the proper *Ex parte Young* defendant in a challenge to tax assessments. 306 F.3d 87 (2d Cir. 2002). The Second Circuit concluded that members of a statewide department were such defendants because though the assessments were made by local authorities, the department had "both the power and the duty under New York law to control assessment of railroad taxes for the local districts." *Id.* at 99. Specifically, it could monitor the quality of local assessment practices, remove assessors, impose penalties on assessors, and order assessors to comply with its directives. *Id.* The Secretary does not have that kind of authority over local election officials.

Seventh Circuit: In *Entertainment Software Association v. Blagojevich*, the plaintiff challenged a law that imposed criminal penalties for failing to label sexually explicit video games. 469 F.3d 641, 643-44 (7th Cir. 2006). The Attorney General conceded she had the power to enforce the law concurrent with that of the State's Attorney. *Id.* at 645; *see also People v. Buffalo Confectionery Co.*, 401 N.E.2d 546, 549 (Ill. 1980). Here, the Secretary has no authority to discipline—let alone bring criminal charges—against local election officials or anyone else for violating Texas's election laws.

C. On-point cases from other circuits are consistent with the decision below.

To the contrary, cases that petitioners do not cite demonstrate that, like the Fifth Circuit, other courts of appeals hold that local officials are the appropriate defendants to sue when state law is enforced by local actors.

Third Circuit: *1st Westco Corp. v. School District of Philadelphia* considered a challenge to a law that required all construction work on public-school buildings to be done by Pennsylvania residents. 6 F.3d 108, 112 (3d Cir. 1993). Because the statute was enforced through a school district's refusal to pay for noncompliant work, the court concluded it was enforced by the local district, not the state Attorney General or Secretary of Education. *Id.* at 113. The court further held that those officials' "general duty to uphold the laws of Pennsylvania, standing alone, will not suffice to render them proper defendants in this lawsuit." *Id.* at 115.

Fourth Circuit: *Doyle v. Hogan* determined that the Governor and Attorney General of Maryland were not appropriate *Ex parte Young* defendants in a challenge to a law prohibiting conversion therapy. 1 F.4th 249, 256 (4th Cir. 2021). The court explained that it is "not enough that the officer possesses the '[*g*]*eneral authority* to enforce the laws of the state' broadly if the officer cannot enforce the law at issue." *Id.* at 255. There, disciplinary authority was located with Maryland's State Board of Professional Counselors and Therapists. *Id.* at 255. Because the relevant gubernatorial appointee could not interfere with Board decisions, the Governor's authority to "supervise and direct" the officers and units of the executive branch did not create a connection to enforcement. *Id.* at 256. The Attorney General's obligation to provide

advisory opinions also did not constitute enforcement because "[s]imply advising other departments does not give the Attorney General control over *enforcing* the Act." *Id.*

* * *

In sum, the cases that petitioners cite are materially distinguishable. Those cases that actually addressed properly raised arguments about similar local-enforcement regimes show there is no "conflict with the decision of another United States court of appeals on the same important matter" that merits this Court's review. Sup. Ct. R. 10(a).

III. This Case Is a Poor Vehicle to Resolve the Question Presented.

Assuming the Fifth Circuit erred in applying *Ex parte Young* (which it did not), and that error presents a cert-worthy issue (which it does not), this case would present a poor vehicle to address it for multiple reasons. Because of its sovereign-immunity ruling, the Fifth Circuit had no need to address petitioners' lack of standing. But petitioners bore the burden of demonstrating standing, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 103-04 (1998), and their evidence falls short on multiple counts. This alternative ground for affirmance makes this case a poor vehicle for resolving the *Ex parte Young* issue. So too does the fact that claims remain pending before the district court against two local election officials who implement the signature-verification laws and do not present the same *Ex parte Young* problem that the Secretary does.

A. Petitioners lack standing.

1. Petitioners have not shown a cognizable injury.

Petitioners and the Secretary clearly disagree about the constitutionality of signature-verification laws, but "[t]he presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art[icle] III's requirements." *Diamond v. Charles*, 476 U.S. 54, 62 (1986). Petitioners must demonstrate an injury in fact. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Neither has.

Weisfeld: The district court allowed Weisfeld to proceed based on a "realistic chance" that Weisfeld's ballot would be rejected in a future election. Pet. App. 103a. In its view, "there is no 'threshold' probability of disenfranchisement that a plaintiff must prove in order to demonstrate 'substantial risk.'" Pet. App. 104a. This alone was grounds to vacate its judgment.

Under this Court's precedent, to have standing, Weisfeld's injury must be "*certainly impending*," *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013), or at least represent a "substantial risk" of harm, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). "Allegations of *possible* future injury" are not enough to demonstrate standing—particularly at summary judgment. *Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990) (emphasis added). The district court's "realistic chance" test, thus, used the wrong legal standard.

That Weisfeld previously had a ballot rejected under the signature-verification laws is not sufficient to establish standing for the injunctive relief available under *Ex parte Young*. As this Court has repeatedly held, a single allegedly wrongful act in the past does not establish a certainly impending injury in the future. *City of Los*

Angeles v. Lyons, 461 U.S. 95, 105-07 (1983); *O'Shea v. Littleton*, 414 U.S. 488, 495-96 (1974). Thus, the City of McAllen's prior rejection of Weisfeld's mail-in ballot does not establish that it, or any other local election official, will improperly reject her ballot in the future.

Further, Weisfeld's summary-judgment evidence does not prove a certainly impending injury. Although she produced evidence that signature-verification problems led to the rejection of 1,567 mail-in ballots in 2016 and 3,746 in 2018, ROA.989-90, she produced no evidence of whether those ballots were *wrongly* rejected. Instead, the district court identified only two wrongly rejected ballots, Pet. App. 89a-90a, which hardly shows a substantial likelihood of injury sufficient to strike down a state law as facially unconstitutional. And though Weisfeld suffered a brain injury after filing suit, ROA.1082, she has not argued that there is a substantial risk the injury will impact her ability to comply with this law, which creates special rules to accommodate voters with disabilities, Tex. Elec. Code § 1.011. Accordingly, Weisfeld has not shown a cognizable, forward-looking injury in fact.

CTD: Similarly flawed is CTD's diversion-of-resources theory under *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Under that theory, CTD must show that the signature-verification laws "perceptibly impaired" its ability to achieve its goals, causing it to devote "significant resources" to counteracting the unlawful conduct. *Id.* at 379. Here, CTD's representative generally stated that CTD diverts resources to instruct voters to "write out signatures neatly or to try to make signatures match." ROA.2277. But *Carney v. Adams* held that such generalized statements must be considered in the context of the record. 141 S. Ct. 493, 500-01 (2020).

And in context, CTD's evidence does not support standing at the time suit was filed. *Lujan*, 504 U.S. at 569 n.4.

The summary-judgment record reflects that when this suit was filed, CTD had made one social-media post referencing signatures: a July 4, 2019, Facebook post reminding people to register to vote with a two-sentence "Pro tip" about matching signatures. ROA.2536. A two-sentence Facebook post does not "perceptibly impair[]" CTD's ability to achieve its goals. *See Havens*, 455 U.S. at 379. The remainder of CTD's evidence reflects activities occurring *after* the complaint was filed, which cannot establish standing as a matter of law. ROA.1177, 1180, 1189-93, 1200-01, 1203-04.

Even if they could, there is no evidence that these activities required diversion of "significant resources." Indeed, CTD's representative could not identify what amount CTD spent on voting-related work, ROA.4716-17, or even a single voter CTD had helped with a rejected ballot, ROA.4722. He also testified that CTD's trainings and conferences on voter education would continue regardless of whether the signature-verification laws were enjoined. ROA.4727-30. Under the Fifth Circuit's rule, an organization's routine communications about the law do not to establish an article III injury. *NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010). And that rule is consistent with the law of other Circuits. *E.g.*, *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 920 (D.C. Cir. 2015); *Fair Elections Ohio v. Husted*, 770 F.3d 456, 459-60 (6th Cir. 2014).

2. Petitioners' alleged injuries are not traceable to or redressable by the Secretary.

In addition to a failure to prove a cognizable injury, petitioners cannot show that injury—which depends on

the acts of local election officials—is traceable to or redressable by the Secretary. *Lujan*, 504 U.S. at 561. For decades, this Court has held that injuries that result from the independent actions of third parties that are not before the Court are insufficient to demonstrate standing. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976). Those non-party officials would not be bound by a judgment of the district court, even if framed in the form of an "advisory" by the Secretary. *See Jacobson*, 974 F.3d at 1255.

Even assuming the Secretary *were* to advise local officials to stop complying with the signature-verification laws because he personally decided they were unconstitutional, it is a crime to intentionally accept a ballot that the person knows fails the signature-verification requirement. Tex. Elec. Code § 87.041(g). The district and county attorneys who would prosecute those violations are part of the judicial branch of the Texas Government, TEX. CONST. art. V, § 21, and they are not bound by the Secretary's (or any other executive branch official's) legal opinions.

Because it is "speculative whether the desired exercise of the court's remedial powers in this suit would result" in redressing petitioners' injuries, standing is lacking. *Simon*, 426 U.S. at 43; *see also Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992) (Scalia, J., concurring). The existence of such an alternative jurisdictional ground for affirmance makes this a poor vehicle to resolve any lingering questions about the Fifth Circuit's approach to *Ex parte Young*.

B. Review is premature as claims remain before the district court.

Even if the Court were to conclude that petitioners have standing, this would still be a poor vehicle to resolve

the question presented which is effectively in an interlocutory posture—the district court addressed only two of four claims, two of six plaintiffs, and one of three defendants, Pet. App. 96a-97a, and indicated that additional relief could be forthcoming, Pet. App. 84a n.1.

It has long been this Court's "normal practice [to] deny[] interlocutory review" even when presented with significant statutory or constitutional questions. *Estelle v. Gamble*, 429 U.S. 97, 114-15 (1976) (Stevens, J., dissenting). The Chief Justice articulated this Court's general presumption against review of interlocutory decisions in *Abbott v. Veasey*, 137 S. Ct. 612 (2017) (*Veasey II*), where the en banc Fifth Circuit concluded that Texas's undisputed interest in preventing voter fraud did not justify requiring a voter to present identification at the polls largely because the law did not apply to mail-in ballots where fraud is "far more prevalent." *Veasey v. Abbott*, 830 F.3d 216, 263 (5th Cir. 2016) (en banc) (*Veasey I*). The Fifth Circuit remanded, however, "for further proceedings on an appropriate remedy." *Veasey II*, 137 S. Ct. at 613 (Roberts, C.J., respecting the denial of certiorari). This Court denied immediate review despite the undisputed national importance of the question presented because, as the Chief Justice explained, "[t]he issues will be better suited for certiorari review" "after entry of final judgment." *Id.*

This rule reflects the reality that litigation is inherently unpredictable, and later developments may change the character of—or entirely obviate the need to address—the question presented. *See* William J. Brennan, Jr., *Some Thoughts on the Supreme Court's Workload*, 66 JUDICATURE 230, 231-32 (1983). This can be seen in *Veasey II*, which never returned to the Court because "[d]uring the remand, the Texas Legislature passed a

law designed to cure all the flaws" identified by the plaintiffs. *Veasey v. Abbott*, 888 F.3d 792, 795 (5th Cir. 2018) (*Veasey III*). Because "[t]he Legislature succeeded in its goal," *id.*, this Court did not need to address difficult questions about whether the superseded statute complied with federal law.

This case presents a prime example of when interlocutory review would be inappropriate for two reasons. *First*, petitioners' claims that remain pending include claims against two local election officials. Pet. App. 84a (addressing only claims against the Secretary). Thus, to the extent *Ex parte Young* is "necessary to 'permit the federal courts to vindicate federal rights,'" *Va. Office for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 255 (2011), that avenue remains available. It is only a question of *which* official can be sued, not whether *any* official can be sued.

Second, although Texas's signature-verification laws have always been constitutional, many of petitioners' concerns have been addressed during the pendency of this litigation. In 2021, the Texas Legislature created a rebuttable presumption that the voter signed the mail-in ballot application and carrier envelope if the voter provides certain identifying information—cutting down on any concern of the wrongful rejection of ballots. Tex. Elec. Code § 87.041(d-1). And it created a notice-and-cure process for which the Secretary can prescribe implementing procedures. *Id.* §§ 87.0271, .0411. This Court's normal practices suggest that the district court should be afforded the opportunity to assess these changes *before* this Court addresses the question presented.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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