

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

MISSOURI PROTECTION & ADVOCACY
SERVICES, et al.,

Plaintiffs,

v.

JOHN R. ASHCROFT, in his official capacity as the
Missouri Secretary of State, et al.,

Defendants.

Civil Action No. 2:22-cv-04097

STATEMENT OF INTEREST OF THE UNITED STATES

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TABLE OF CONTENTS

Introduction..... 1

Interest of the United States 1

Procedural Background..... 2

Statutory Background 3

Argument 3

 I. Private Plaintiffs May Enforce Section 208 of the Voting Rights Act..... 3

 A. The VRA’s Text Evinces Congress’s Intent To Provide A Private Right Of Action
To Enforce Section 208 4

 1. Section 208 Contains Rights-Creating Language 4

 2. Congress Intended To Provide A Private Remedy To Enforce Section 208 5

 3. Congress’s Intent To Provide A Private Remedy To Enforce Section 208 Can Be
Inferred From Other Sections Of The VRA. 7

 B. Courts Consistently Find That Private Plaintiffs Have A Right To Sue Under Section
208..... 9

 C. A Private Right Of Action Under The VRA Was Already Well Established When
Congress Enacted Section 208..... 10

 II. Section 208 Preempts Missouri’s Single-Voter Assistance Restriction..... 12

Conclusion 15

TABLE OF AUTHORITIES

Cases

<i>Alexander v. Sandoval</i> , 532 U.S. 275 (2001).....	4, 5
<i>Allen v. State Bd. of Elections</i> , 393 U.S. 544 (1969).....	5, 6, 7, 8
<i>Ark. United v. Thurston</i> , 517 F. Supp. 3d 777 (W.D. Ark. 2021).....	10
<i>Ark. United v. Thurston</i> , No. 5:20-CV-5193, 2022 WL 4097988 (W.D. Ark. Sept. 7, 2022).....	10, 13, 14, 15
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	2, 3
<i>Bragdon v. Abbott</i> , 524 U.S. 624 (1998).....	11
<i>Brnovich v. Democratic Nat'l Comm.</i> , 141 S. Ct. 2321 (2021).....	7
<i>Cannon v. Univ. of Chi.</i> , 441 U.S. 677 (1979).....	5, 11
<i>Carey v. Wis. Elections Comm'n.</i> , No. 22-CV-402-JDP, 2022 WL 3910457 (W.D. Wis. Aug. 31, 2022).....	15
<i>Crosby v. Nat'l Foreign Trade Council</i>	12
<i>Delker v. MasterCard Int'l, Inc.</i> , 21 F.4th 1019 (8th Cir. 2022).....	2
<i>Democracy N.C. v. N.C. State Bd. of Elections</i> , 476 F. Supp. 3d 158 (M.D.N.C. 2020).....	10, 13
<i>Disability Rts. N.C. v. N.C. State Bd. of Elections</i> , No. 5:21-CV-361-BO, 2022 WL 2678884 (E.D.N.C. July 11, 2022).....	14, 15
<i>DSCC v. Simon</i> , 950 N.W.2d 280 (Minn. 2020).....	13
<i>Fla. State Conf. of NAACP v. Lee</i> , 576 F. Supp. 3d 974 (N.D. Fla. 2021).....	9, 10
<i>Garza v. Smith</i> , 320 F. Supp. 131 (W.D. Tex. 1970) (three-judge court).....	3
<i>Gonzaga Univ. v. Doe</i> , 536 U.S. 273 (2002).....	4
<i>Hillsborough Cnty. v. Automated Med. Lab'ys, Inc.</i> , 471 U.S. 707 (1985).....	12
<i>Hous. Lawyers' Ass'n v. Att'y Gen.</i> , 501 U.S. 419 (1991).....	7
<i>Johnson v. City of Shelby, Miss.</i> , 574 U.S. 10 (2014) (per curiam).....	4
<i>Kwon v. Crittenden</i> , No. 1:18cv5405-TCP (N.D. Ga. Nov. 29, 2018).....	13
<i>La Union del Pueblo Entero v. Abbott</i> , No. 5:21-CV-0844-XR, 2022 WL 2706116 (W.D. Tex. July 12, 2022).....	9
<i>La Union Del Pueblo Entero v. Abbott</i> , No. 5:21-CV-0844-XR, 2022 WL 3045657 (W.D. Tex. Aug. 2, 2022).....	10
<i>Lorillard v. Pons</i> , 434 U.S. 575 (1978).....	11
<i>LULAC v. Perry</i> , 548 U.S. 399 (2006).....	7
<i>Migliori v. Cohen</i> , 36 F.4th 153 (3d Cir. 2022).....	4
<i>Morse v. Republican Party of Va.</i> , 517 U.S. 186 (1996).....	7, 9, 11
<i>New Ga. Project v. Raffensperger</i> , 484 F. Supp. 3d 1265 (N.D. Ga. 2020).....	10
<i>OCA-Greater Hous. v. Texas</i> , 867 F.3d 604 (5th Cir. 2017).....	3, 10, 13, 14
<i>OCA-Greater Hous. v. Texas</i> , No. 1:15-CV-679-RP, 2018 WL 2224082, at *4 (W.D. Tex. May 15, 2018), <i>modified in part</i> , No. 1:15-CV-679-RP, 2022 WL 2019295 (W.D. Tex. June 6, 2022).....	13
<i>Pet Quarters, Inc. v. Depository Tr. & Clearing Corp.</i> , 559 F.3d 772 (8th Cir. 2009).....	13
<i>Priorities USA v. Nessel</i> , 462 F. Supp. 3d 792 (E.D. Mich. 2020).....	10, 13
<i>Shelby Cnty. v. Lynch</i> , 799 F.3d 1173 (D.C. Cir. 2015).....	9
<i>Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty's Project, Inc.</i> , 576 U.S. 519 (2015).....	11
<i>Thornburg v. Gingles</i> , 478 U.S. 30 (1986).....	7
<i>United States v. Louisiana</i> , 265 F. Supp. 703 (E.D. La. 1966).....	3
<i>United States v. Raines</i> , 362 U.S. 17 (1960).....	6, 7

<i>Wisniewski v. Rodale, Inc.</i> , 510 F.3d 294 (3d Cir. 2007)	5
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Statutes

1 U.S.C. § 1	8
28 U.S.C. § 517	1
42 U.S.C. § 1983	4
52 U.S.C. § 10101(c)	1
52 U.S.C. § 10301	1
52 U.S.C. § 10302	8
52 U.S.C. § 10304	5
52 U.S.C. § 10307(a)	1
52 U.S.C. § 10308(d)	1
52 U.S.C. § 10308(f)	8
52 U.S.C. § 10310(c)(1)	3
52 U.S.C. § 10310(e)	9
52 U.S.C. § 10501	1
52 U.S.C. § 10501(b)(1)	3
52 U.S.C. § 10504	1
52 U.S.C. § 10508	passim
52 U.S.C. § 20101	12
52 U.S.C. § 20104(c)	11, 12
Mo. Rev. Stat. § 115.115.5	2
Mo. Rev. Stat. § 115.291.1	2
Mo. Rev. Stat. § 115.445.3	passim
Mo. Rev. Stat. § 115.447.2(2)	2
Mo. Rev. Stat. § 115.635.8	2
Pub. L. No. 94-73, § 401, 89 Stat. 404	8
Pub. L. No. 94-73, § 402, 89 Stat. 404	9

Constitutional Provisions

U.S. Const. art. VI, cl. 2	12
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Legislative History

H.R. Rep. No. 32 (1981)	9
S. Rep. No. 40 (1975)	8, 9
S. Rep. No. 94-295 (1975)	11
S. Rep. No. 97-417 (1982)	3, 6, 15

INTRODUCTION

The United States respectfully submits this Statement of Interest, pursuant to 28 U.S.C. § 517, to address two questions of law arising under Section 208 of the Voting Rights Act, 52 U.S.C. § 10508 (“Section 208”). First, the pending motion to dismiss presents the important question of whether private plaintiffs can bring suit to enforce Section 208. The United States submits this statement of interest to explain that private parties may bring suit to enforce Section 208. Second, Defendants assert they may place “reasonable restrictions” on who can provide assistance under Section 208, but that is not the law. The right to assistance conferred by Section 208 is squarely guaranteed by federal law and may not be narrowed by state laws or provisions purporting to limit such assistance. The Missouri statute at issue in this case, however, impermissibly restricts voters’ ability to choose their assistor. The United States expresses no view on any issues other than those set forth in this brief.

INTEREST OF THE UNITED STATES

28 U.S.C. § 517 authorizes the Attorney General “to attend to the interests of the United States in a suit pending in a court of the United States.” This case presents important questions regarding interpretation of Section 208, 52 U.S.C. § 10508, of the Voting Rights Act (“VRA”). Section 208 extends voting rights protections to people with disabilities and literacy difficulties and implements, in part, the rights afforded by Section 2 of the VRA, 52 U.S.C. § 10301 (guaranteeing that an equal opportunity to participate in the political process is not denied or abridged based on race, color, or in contravention of the language minority guarantees of the VRA), and Section 201 of the VRA, 52 U.S.C. § 10501 (banning the use of literacy tests). Congress has vested the Attorney General with authority to enforce the Voting Rights Act on behalf of the United States. *See* 52 U.S.C. §§ 10101(c), 10307(a), 10308(d), 10504.

Accordingly, the United States has a substantial interest in ensuring proper interpretation of Section 208.

PROCEDURAL BACKGROUND

Missouri's election code allows any voter who "cannot read or write, is blind or has any other physical disability and cannot vote his ballot" to choose a person to help them vote during an election. Mo. Rev. Stat. § 115.445.3. But Missouri prohibits anyone—except election judges and immediate family members—from helping more than one voter during an election. Mo. Rev. Stat. § 115.445.3.

Plaintiffs in this case are two non-profit organizations and three individual voters, each of whom either works to assist voters with disabilities or limited English proficient voters or is a voter in these categories. Compl. at ¶¶ 19–26, ECF No. 1. In their complaint, Plaintiffs allege that provisions in Mo. Rev. Stat. §§ 115.445.3, 115.635.8, 115.115.5, 115.447.2(2), and 115.291.1 violate the Supremacy Clause and Section 208 because these statutes prevent voters from using assistors of their choice. *Id.* at ¶¶ 109–17. Defendants have moved to dismiss Plaintiffs' claims, arguing that there is no private right of action in Section 208 and, in any event, Missouri's election code does not violate Section 208. *See* Mot., ECF No. 34. Defendants also argue that Plaintiffs lack standing. *Id.*

LEGAL STANDARD

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation and quotation marks omitted); *see also Delker v. MasterCard Int'l, Inc.*, 21 F.4th 1019, 1024 (8th Cir. 2022) (directing district courts to "assume the truth of all factual allegations in the complaint and make all reasonable inferences in favor of the nonmoving party"). So long as the "plaintiff pleads factual content that allows the court to

draw the reasonable inference that the defendant is liable,” the motion to dismiss must be denied. *Iqbal*, 556 U.S. at 678.

STATUTORY BACKGROUND

Section 208 of the VRA states that “[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.” 52 U.S.C. § 10508. The VRA defines the terms “vote” and “voting” broadly to encompass “all action necessary to make a vote effective,” including “casting a ballot[] and having such ballot counted properly.” *Id.* § 10310(c)(1); *see also OCA-Greater Hous. v. Texas*, 867 F.3d 604, 614–15 (5th Cir. 2017); *Garza v. Smith*, 320 F. Supp. 131, 136 (W.D. Tex. 1970) (three-judge court) (defining the right to vote to include “the right to be informed”); *United States v. Louisiana*, 265 F. Supp. 703, 708 (E.D. La. 1966) (three-judge court) (“We cannot impute to Congress the self-defeating notion that an illiterate has the right [to] pull the lever of a voting machine, but not the right to know for whom he pulls the lever.”), *aff’d*, 386 U.S. 270 (1967). Congress passed Section 208 to reinforce the nationwide ban on literacy tests by “assur[ing] meaningful voting assistance” and in turn “greater participation in our electoral process.” S. Rep. No. 97-417, at 62–63 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 240; *see also* 52 U.S.C. § 10501(b)(1).

ARGUMENT

I. Private Plaintiffs May Enforce Section 208 of the Voting Rights Act

Private plaintiffs have a right to enforce Section 208, as is evident from the text and structure of the statute itself, as well as the broader provisions within the VRA. Courts confronted with Section 208 claims often recognize a private right of action, and Congress

enacted Section 208 knowing that private plaintiffs had been successfully enforcing the VRA for decades.

A. The VRA’s Text Evinces Congress’s Intent To Provide A Private Right Of Action To Enforce Section 208

Congress’s intent to create a private right of action under the VRA flows directly from the statutory “text and structure.” *Alexander v. Sandoval*, 532 U.S. 275, 287–88 (2001). Under *Sandoval*, courts determine whether Congress intended to create a private right of action by: (1) making the “critical” determination whether the statute in question contains “rights-creating language”; and, if so, (2) assessing whether Congress has “manifest[ed] an intent to create a private remedy.” *Id.* at 288–289 (citation and internal quotation marks omitted). Section 208 undeniably contains rights-creating language. Moreover, Congress’s intent to create a private remedy to enforce Section 208 is apparent from several other VRA provisions that reflect Congress’s understanding that Section 208 is privately enforceable.¹

1. Section 208 Contains Rights-Creating Language

The “critical” question is whether Section 208 contains rights-creating language, and it indisputably does. *Sandoval*, 532 U.S. at 288. Courts can discern whether a statute has rights-

¹ The Statement of Interest focuses here on whether there exists an implied private right of action because of Defendants’ arguments in their motion to dismiss, but in any event, Plaintiffs can seek to enforce rights-creating statutes through 42 U.S.C. § 1983. Plaintiffs did not allege a Section 1983 claim here, but that is not necessary. The Supreme Court has held that a complaint need not expressly invoke Section 1983. *See Johnson v. City of Shelby, Miss.*, 574 U.S. 10 (2014) (per curiam) (“no heightened pleading rule requires plaintiffs seeking damages for violations of constitutional rights to invoke § 1983 expressly in order to state a claim.”). Section 1983 would provide Plaintiffs the remedy they seek here. *See Migliori v. Cohen*, 36 F.4th 153, 160 (3d Cir. 2022) (private plaintiffs have a right of action under 42 U.S.C. 1983 to enforce the Materiality Provision of the Civil Rights Act of 1964). “Plaintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes.” *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002).

creating language by analyzing whom the statute benefits. *Cannon v. Univ. of Chi.*, 441 U.S. 677, 690 (1979). That is, if a statute explicitly refers to a right and focuses on individuals rather than regulators, then Congress likely intended to create a private right. *Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 302 (3d Cir. 2007). Section 208 provides: “Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.” 52 U.S.C. § 10508. The “special class to be benefited,” *Cannon*, 441 U.S. at 690, by this statute are voters who are blind, disabled, or unable to read or write, and the statute grants these voters an explicit right to a voting assistant of their choice. Courts have relied on similar language to infer Congress’s intent to create a private right of action to enforce Section 5 of the VRA. *Allen v. State Bd. of Elections*, 393 U.S. 544, 555 (1969); *Cannon*, 441 U.S. at 690; *see* 52 U.S.C. § 10304. Thus, Section 208 grants individual voters who need assistance in voting the right to receive assistance in voting from a person of their choice, subject to certain limited exclusions made explicit in the statute.

2. *Congress Intended To Provide A Private Remedy To Enforce Section 208*

Congress’s intent to provide a private remedy to enforce Section 208 is shown by: (1) the statute’s rights-creating language; (2) the private nature of voting rights; and (3) several VRA provisions that evince Congress’s understanding that Section 208 can be privately enforced.

Because Section 208 plainly contains rights-creating language, a strong presumption exists that Congress also intended to create a private remedy to enforce those rights. That is because “the right- or duty-creating language of [a] statute has generally been the most accurate indicator of the propriety of implication of a cause of action.” *Cannon*, 441 U.S. at 690 n.13; *see also Sandoval*, 532 U.S. at 288. The Senate Report on Section 208 evidences this intent:

Congress amended the VRA in 1982 to, among other things, protect groups of voters who “run the risk that they will be discriminated against at the polls and that their right to vote in state and federal elections will not be protected.” S. Rep. No. 97-417, 62, 1982 U.S.C.C.A.N. 177, 240. Congress recognized that voters who require assistance may be hesitant to rely on “someone other than a person of their own choice,” and might choose not to vote all if they are denied the assistor of their choice. *Id.* “To limit the risks of discrimination against voters in these specified groups and avoid denial or infringement of their right to vote,” and to “encourage greater participation in our electoral process,” Congress concluded that Section 208 was necessary to ensure that certain voters had the right to choose a person to assist them with voting. *Id.*

To be sure, the VRA authorizes civil suits by the United States to enforce the statute’s substantive provisions. But interpreting the statute to require “each citizen * * * to depend solely on litigation instituted at the discretion of the Attorney General” would leave many violations unremedied and “severely hamper[.]” the statute’s enforcement. *Allen*, 393 U.S. at 556. The limited federal resources available for VRA enforcement reinforce the need for a private cause of action. As the Supreme Court has noted, “[t]he Attorney General has a limited staff” who may not always be able “to uncover quickly new regulations and enactments passed at the varying levels of state government.” *Id.* at 556. The presumption that Congress intends to provide a private remedy where it includes rights-creating language is even stronger in the context of the VRA because voting rights typically are considered “private rights.” *See United States v. Raines*, 362 U.S. 17, 27 (1960). Given that voting rights inhere in individual citizens, Congress’s decision to authorize suits by the United States under the VRA does not overcome the strong presumption that Congress also intended private enforcement of this rights-creating statute. *Allen*, 393 U.S. at 555 n.18 (“[W]e find merit in the argument that the specific references

[in the VRA] to the Attorney General were included to give the Attorney General power to bring suit to enforce what might otherwise be viewed as ‘private’ rights.”) (quoting *Raines*, 362 U.S. at 27)).

3. *Congress’s Intent To Provide A Private Remedy To Enforce Section 208 Can Be Inferred From Other Sections Of The VRA.*

Tracing back to the early days of the VRA, courts have found private plaintiffs can enforce various provisions of the VRA, such as Sections 2, 5 and 10. It would be anomalous for this Court to construe Section 208 different from how the Supreme Court has construed any other section of the VRA. For example, “The existence of the private right of action under Section 2 . . . has been clearly intended by Congress since 1965,” and the Supreme Court, in turn, has “entertained cases brought by private litigants to enforce § 2.” *Morse v. Republican Party of Va.*, 517 U.S. 186, 232 (1996) (internal citations and quotation marks omitted); *see also Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct. 2321, 2333, 2333 n.5 (2021) (collecting the “steady stream” of private Section 2 cases heard by the Court); *see also, LULAC v. Perry*, 548 U.S. 399 (2006); *Hous. Lawyers’ Ass’n v. Att’y Gen.*, 501 U.S. 419 (1991); *Thornburg v. Gingles*, 478 U.S. 30 (1986). In fact, the Supreme Court held that a private cause of action exists to enforce Section 10 of the Voting Rights Act, in part because it would have been “anomalous” for a court “to hold that both § 2 and § 5 are enforceable by private action but § 10 is not.” *Morse*, 517 U.S. at 232; *see also Allen*, 393 U.S. at 557 (holding that an “individual citizen” may bring suit “to insure that his city or county government complies with” Section 5).

The text of Sections 12(f), 3, and 14(e) provide clear evidence that private plaintiffs may sue under Section 208. First, Section 12(f) grants courts jurisdiction over private actions brought under the VRA: “The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to [Section 12 of the VRA] and shall exercise the same without regard to

whether *a person* asserting rights under the provisions of chapters 103 to 107 of this title shall have exhausted any administrative or other remedies that may be provided by law.” 52 U.S.C. § 10308(f) (emphasis added). The statutory term “person” is broad and “include[s] corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” Dictionary Act, 1 U.S.C. § 1. Section 12(f) therefore reflects Congress’s intent that federal courts have subject matter jurisdiction over suits to enforce the VRA’s substantive provisions—brought by private plaintiffs, as well as by the United States. *Allen*, 393 U.S. at 555 n.18 (finding “force” to the argument that Section 12(f) “necessarily implies that private parties may bring suit under the [VRA]”).

Second, Section 3 similarly reflects Congress’s understanding that private plaintiffs can enforce the VRA’s substantive provisions—by providing specific remedies to “the Attorney General *or an aggrieved person*” in lawsuits brought “under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment.” 52 U.S.C. § 10302 (emphasis added). Congress added the term “aggrieved person” to each of Section 3’s remedies when it amended the VRA in 1975, Pub. L. No. 94-73, § 401, 89 Stat. 404, knowing full well that *Allen* had construed the VRA as permitting private suits, 393 U.S. at 556–557; *see also* S. Rep. No. 40 (1975) (stating that an “aggrieved person” includes “an individual or an organization representing the interests of injured persons”). The VRA’s remedy for aggrieved persons to enforce the voting guarantees of the Reconstruction Amendments evinces Congress’s intent to allow private party enforcement of the VRA’s provisions, including Section 208. *Fla. State Conf. of NAACP v. Lee*, 576 F. Supp. 3d 974, 989 (N.D. Fla. 2021) (“Congress clearly designed Section 208 to enforce the Fourteenth Amendment’s guarantees.”); *La Union del Pueblo Entero v. Abbott*, No. 5:21-CV-0844-XR, 2022 WL 2706116, at *16–17 (W.D. Tex. July 12, 2022).

Keeping in mind Section 208's history and purpose, Congress would have intended for private enforcement given these aggrieved individuals' connection to the prohibited tests and devices.

Third, Section 14(e) confers a right to attorney's fees, which is only relevant if private parties are pursuing litigation. Section 14(e) provides: "In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, *other than the United States*, a reasonable attorney's fee." 52 U.S.C. § 10310(e) (emphasis added). Like Section 3, Section 14(e) reflects Congress's understanding that private plaintiffs can bring claims under the VRA's substantive provisions. Congress added Section 14(e) to the statute in 1975, well aware of *Allen's* holding. Pub. L. No. 94-73, § 402, 89 Stat. 404; *see also* H.R. Rep. No. 32 (1981) (stating that if private plaintiffs prevail, "they are entitled to attorneys' fees under [Section 14(e)] and [42 U.S.C. §] 1988"); S. Rep. No. 40 (1975) (finding "appropriate" the award of "attorneys' fees to a prevailing party in suits to enforce the voting guarantees of the Fourteenth and Fifteenth amendments, and statutes enacted under those amendments" because "Congress depends heavily on private citizens to enforce the fundamental rights involved"). The availability of fees presupposes that a private cause of action is available to enforce the core provisions of the VRA, including Section 208. *See Shelby Cnty. v. Lynch*, 799 F.3d 1173, 1185 (D.C. Cir. 2015) ("Congress intended for courts to award fees under the [Voting Rights Act] . . . when prevailing parties helped secure compliance with the statute."); *Morse*, 517 U.S. at 234 ("Obviously, a private litigant is not the United States, and the Attorney General does not collect attorney's fees.").

B. Courts Consistently Find That Private Plaintiffs Have A Right To Sue Under Section 208.

Courts uniformly have heard private parties' claims under Section 208 and, in many cases, granted relief without expressing any doubt about a private plaintiff's ability to bring such

claims. *See, e.g., OCA-Greater Hous. v. Tex.*, 867 F.3d 604, 609–614 (5th Cir. 2017) (finding that private plaintiffs had standing to sue Texas under Section 208 while acknowledging Section 208 does not explicitly create a “private right of action,” and remanding to allow the district court to enter new injunction); *Ark. United v. Thurston*, No. 5:20-CV-5193, 2022 WL 4097988, at *8 (W.D. Ark. Sept. 7, 2022), *appeal filed*, No. 22-2918 (8th Cir.) (“*Ark. United I*”) (finding that private plaintiffs had standing to sue state officials under Section 208); *Ark. United v. Thurston*, 517 F. Supp. 3d 777, 790, 798 (W.D. Ark. 2021) (“*Ark. United I*”) (stating existence of private right of action was not “a close question”); *La Union Del Pueblo Entero v. Abbott*, No. 5:21-CV-0844-XR, 2022 WL 3045657, at *31 (W.D. Tex. Aug. 2, 2022) (collecting cases on private right of action under Section 208); *Fla. State Conf. of NAACP*, 576 F. Supp. 3d at 990 (same); *New Ga. Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1301 (N.D. Ga. 2020), *appeal dismissed*, No. 20-13360-DD, 2021 WL 4128939 (11th Cir. Mar. 9, 2021); *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 233–36 (M.D.N.C. 2020); *Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 816 (E.D. Mich. 2020). And, often, state defendants agree that private plaintiffs can sue under Section 208. *See, e.g., Ark. United II*, 2022 WL 4097988 at *10 n.11.

C. A Private Right Of Action Under The VRA Was Already Well Established When Congress Enacted Section 208.

When Congress amended the VRA to include Section 208, it was well aware that courts were uniformly entertaining VRA lawsuits brought by private plaintiffs and, in fact, had itself included private remedies in earlier amendments to the Act. *See* Part I.A., *supra*. Before Congress added Section 208 to the Voting Rights Act in 1982, it had expressed its intent to “establish[] a dual enforcement mechanism . . . [that gives] enforcement responsibility to a governmental agency, and . . . has also provided remedies to private persons acting as a class or

on their own behalf.” S. Rep. No. 94-295, at 40 (1975). And, Congress enacted the VRA “against a ‘backdrop’ of decisions in which implied causes of action were regularly found.” *Morse*, 517 U.S. at 231 (quoting *Cannon*, 441 U.S. at 698 nn.22–23). Given that Section 208 was passed in a context where courts routinely heard private suits to enforce the VRA, Congress would have been “aware of this unanimous precedent,” *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 536 (2015), when it added Section 208 to the VRA. *See also Morse*, 517 U.S. at 231–32 (attaching “significance to the fact that the Attorney General had urged us to find that private litigants may enforce the Act”); *see also Lorillard v. Pons*, 434 U.S. 575, 581 (1978) (holding that “where, as here, Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.”); *Bragdon v. Abbott*, 524 U.S. 624, 644–45 (1998). Thus, Congress intended for private plaintiffs to enforce their rights under the VRA, including Section 208’s assistance guarantees.

Defendants argue that Section 208 does not provide a private right of action because it is enforced differently than the rest of the Voting Rights Act. *See* Mot. at 10–11, ECF No. 34. That is not true. Defendants incorrectly cite 52 U.S.C. § 20104(c) as Section 208’s remedy provision; however, § 20104(c) applies to an entirely different statutory scheme called the Voting Accessibility for the Elderly and Handicapped Act (“VAEHA”). Congress enacted 52 U.S.C. §§ 20101–20107 in 1984 to improve “access for handicapped and elderly individuals to registration facilities and polling places.” *See* 52 U.S.C. § 20101. Defendants note that Section 20104(c) requires each state’s chief election officer to provide public notice to elderly and handicapped voters regarding several resources that may assist them in voting, including assistance under Section 208 of the Voting Rights Act. *See* 52 U.S.C. § 20104(c). The

requirement to notify VAEHA-covered voters about their rights under Section 208 says nothing about a *remedy for violating Section 208*. In other words, Section 20105 provides a remedy for violating VAEHA, not Section 208 of the VRA. Defendants' argument that Congress created a separate enforcement mechanism for Section 208 is simply wrong.

II. Section 208 Preempts Missouri's Single-Voter Assistance Restriction.

To the extent that Missouri's laws interfere with Defendants' ability to meet their federal civil rights obligations, Section 208 supersedes any conflicting provisions of state law. The Supremacy Clause of the U.S. Constitution makes clear that a state statute is preempted to the extent it conflicts with federal law. *See* U.S. Const. art. VI, cl. 2. The Supreme Court has "held repeatedly that state laws can be pre-empted by federal regulations as well as by federal statutes." *Hillsborough Cnty. v. Automated Med. Lab'ys., Inc.*, 471 U.S. 707, 713 (1985). State law conflicts with federal law either (1) when it is impossible to comply with both state and federal law or (2) "where 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000) (internal citation omitted); *see also Pet Quarters, Inc. v. Depository Tr. & Clearing Corp.*, 559 F.3d 772, 780 (8th Cir. 2009).

Courts have preempted state laws that are incompatible with Section 208 on several occasions. *See, e.g., Ark. United II*, 2022 WL 4097988, at *8 (Arkansas' voter assistance limit pre-empted by Section 208); *Democracy N.C.*, 476 F. Supp. 3d at 233–36; *Priorities USA*, 462 F. Supp. 3d at 816; *DSCC v. Simon*, 950 N.W.2d 280, 289 (Minn. 2020) (Minnesota's three-voter limit on marking assistance pre-empted by Section 208); Ex. 1, Consent Order, *Kwon v. Crittenden*, No. 1:18cv5405-TCP (N.D. Ga. Nov. 29, 2018), ECF No. 7 (Georgia voter

assistance limits pre-empted by Section 208); *OCA-Greater Hous.*, 867 F.3d at 609-614; *OCA-Greater Hous. v. Texas*, No. 1:15-CV-679-RP, 2018 WL 2224082, at *4 (W.D. Tex. May 15, 2018), *modified in part*, No. 1:15-CV-679-RP, 2022 WL 2019295 (W.D. Tex. June 6, 2022) (Texas voter assistance restrictions pre-empted by Section 208). These cases reflect courts' uniform understanding of Section 208's text and the refusal to allow states to limit Section 208's broad protections as Defendants now suggest.

The plain language of Mo. Rev. Stat. § 115.445.3 restricts a Section 208 voter's choice of assistor. Missouri limits anyone other than an election judge or immediate family member from assisting more than one voter at one election. Mo. Rev. Stat. § 115.445.3. If more than one voter chooses the same person to assist them with their ballot and this person is not an election judge or immediate family member, then at least one of those voters will not be given the assistance guaranteed to them under the VRA. For example, a neighbor would be unable to assist a limited English proficient couple because of this restriction. Missouri's single-voter assistance restriction directly conflicts with Section 208 and is therefore preempted by it.

Missouri's single-voter assistance restriction "impermissibly narrows the right guaranteed by Section 208 of the VRA." *OCA-Greater Hous.*, 867 F.3d at 615. The State's restriction is narrower than similar restrictions in other states that were found to be preempted by Section 208. For example, in *Arkansas United v. Thurston*, the court struck down a provision that barred anyone from assisting more than *six* voters during an election. *Ark. United II*, 2022 WL 4097988 at *18. And in *OCA-Greater Houston v. Texas*, the court held that a state statute that otherwise tracked Section 208 was nonetheless preempted because it required a chosen assistor to be registered to vote in the same county as the person requesting assistance. 867 F.3d at 615.

The State incorrectly contends that Section 208 requires that it only *consider* a voter's chosen assistor but may ultimately make its own determination regarding who *actually* assists the voter. *See* Mot. at 20, ECF No. 34. Contrary to the State's reading of the statute, states cannot choose assistors for voters under Section 208. *See Ark. United II*, 2022 WL 4097988 at *17 (holding that "the one thing states cannot do is disallow voters the assistor of their choice—precisely what the [statute at issue] does."); *see also OCA-Greater Hous.*, 867 F.3d at 614; *Disability Rts. N.C. v. N.C. State Bd. of Elections*, No. 5:21-CV-361-BO, 2022 WL 2678884, at *4 (E.D.N.C. July 11, 2022) (holding that "the plain language of Section 208 gives voters unrestricted choice over who may assist them with the voting process."). The State also argues that Section 208's use of "a" person rather than "the" person indicates the State's authority to legislate restrictions on a voter's specific choice of assistor. Mot. at 20, ECF No. 34. But "[t]he use of the indefinite article 'a' does not show intent by Congress to allow states to restrict a federally created right, for Congress does not hide elephants in mouseholes." *Disability Rts. N.C.*, 2022 WL 2678884, at *4 n.2.

In defense, the State argues that a broader reading of Section 208 would permit what it deems to be "absurd" results, such as felons assisting voters or voters forcing individuals to help against their will. *Id.* "But a common-sense reading of § 208 suggests that any assistor chosen by a voter must be *willing* and *able* to assist." *Ark. United II*, 2022 WL 4097988 at *17 ("If a chosen person declines to assist the voter or simply does not show up at the polling place, that person has not violated § 208. And an incarcerated person would not be able assist at the polling place for reasons that are completely unrelated to Arkansas's elections laws.").

Missouri also argues that its single-voter assistance restriction strengthens Section 208 because it protects those needing assistance from manipulation or undue influence. *See* Mot. at

20–22, ECF No. 34. Limiting a voter’s “choice” of assistors is inconsistent with the letter and the intent of Section 208, which is to ensure a voter can receive assistance from “a person whom the voter trusts and cannot intimidate” them as “the only kind of assistance that will make fully meaningful” their vote. S. Rep. No. 97-417, at 62 (1982). Congress considered “susceptible” and “vulnerable” voters when it drafted Section 208 and provided these voters with an unrestricted choice of assistants – and included the employer-related and union-related restrictions to address concerns about undue influence. *Disability Rts. N.C.*, 2022 WL 2678884, at *4–5. Congress has chosen the appropriate balance, and courts have, therefore, declined to endorse a state’s argument—like the one made here, Mot. at 21–22, ECF No. 34—that the state’s restrictions on assistance to voters covered by Section 208 somehow protect voters from intimidation and coercion. *Id.* Courts reject the idea that a state has complied with Section 208 as long as there is “at least one means by which the voter can cast his ballot with help from a person of his choice.” *Carey v. Wis. Elections Comm’n.*, No. 22-CV-402-JDP, 2022 WL 3910457, at *9 (W.D. Wis. Aug. 31, 2022).

CONCLUSION

Private plaintiffs have a right to sue under Section 208 of the VRA. Section 208 guarantees voters with disabilities or limited English proficiency an assistor of their choice when voting, with only limited exceptions stated on the face of Section 208. Mo. Rev. Stat. § 115.445.3 conflicts with the right of voters to receive assistance from an assistor of their choice under Section 208 and is therefore preempted by it.

DATE: September 16, 2022

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CERTIFICATE OF SERVICE

I certify that on September 16, 2022, a true and correct copy of the foregoing and any attachments were filed electronically with the Court using the CM/ECF system, which sent notification to counsel.

/s/ Emily R. Brailey

Exhibit 1

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**IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

JIN KWON and ASIAN AMERICANS)
ADVANCING JUSTICE-ATLANTA,)

Plaintiffs,)

) CIVIL ACTION

v.)

) No. 1:18cv5405-TCB

ROBYN A. CRITTENDEN, in her official)
capacity as Secretary of State,)

Defendant.)
_____)

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CONSENT ORDER

Plaintiffs filed this action against the Georgia Secretary of State pursuant to the Voting Rights Act and the First and Fourteenth Amendments, seeking to enjoin enforcement of O.C.G.A. § 21-2-409(b)(2), which limits those persons that may assist a voter when no candidate for federal office appears on the ballot to registered voters in the voter’s precinct, statutorily specified family members, and the voter’s caretaker. Section 21-2-409(b)(2) also limits the number of voters any

one person can assist to ten (10) in any election with no federal candidate on the ballot.

Sec. 208 of the Voting Rights Act, 52 U.S.C. § 10508 provides that voters requiring assistance “may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent of that employer or officer or agent of the voter’s union.” Sec 208 of the VRA does not limit the number of voters any one person may assist in an election.

This Court has jurisdiction of this action pursuant to 52 U.S.C. § 20510(b) and 28 U.S.C. §§ 1331 and 1343(a)(4).

In order to avoid the burden, delays, and uncertainties of litigation and to efficiently and expeditiously promote the parties’ shared goal of ensuring that Georgia’s voters are afforded the rights guaranteed by the requirements of the Voting Rights Act, the parties consent to the terms of this Order.

WHEREFORE, the parties having freely given their consent, and the terms of the Consent Decree being fair, reasonable, and consistent with the requirements of the VRA, it is hereby ORDERED, ADJUDGED and DECREED that:

1) Defendant, Secretary of State, and the Secretary of State’s officers, assigns, successors, agents, servants, employees, attorneys, and other persons who

are in active concert or participation with them, are hereby enjoined from enforcing or relying on O.C.G.A. § 21-2-409(b)(2).

2) Consistent with Sec. 208 of the Voting Rights Act, voter assistance in all future elections will be governed by O.C.G.A. § 21-2-409(a) and § 21-2-409(b)(1), regardless of whether a candidate for federal office appears on the ballot.

3) The Secretary shall issue a bulletin immediately, and by no later 5:00 PM on Thursday, November 29, 2018, to all county election superintendents and direct them to permit voters requiring assistance to receive assistance from anyone of the voter's choosing, subject to the requirements of both Sec. 208 of the VRA and O.C.G.A. § 21-2-409(b)(1). This bulletin shall also inform county election superintendents that they may not require individuals assisting voters to check off any boxes on any forms, including those on absentee ballots and absentee ballot envelopes, indicating their relationship to the voters or how many voters they have assisted. However, nothing herein prevents county election officials from requiring persons assisting voters to identify themselves, as required by O.C.G.A. § 21-2-409(a). The Secretary shall also provide all county election superintendents a copy of this Order.

4) The Secretary agrees, for the December 2018 run-off, to provide notice to the public by issuing a press release by 5:00 PM on Thursday, November 29, 2018, reporting that all voters entitled to assistance with voting may receive assistance from any person of their choice who satisfies the requirements of Section 208 of the Voting Rights Act, 52 U.S.C. § 10508 and O.C.G.A. § 21-2-409(b)(1), regardless of whether or not there is a federal candidate on the ballot.

5) The Secretary agrees to provide notice to the public on the Secretary of State's website that all voters entitled to assistance with voting may receive assistance from any person of their choice who satisfies the requirements of Section 208 of the Voting Rights Act, 52 U.S.C. § 10508 and O.C.G.A. § 21-2-409(b)(1), regardless of whether or not there is a federal candidate on the ballot. Said Notice will remain on the Secretary of State's website so long as the current version of O.C.G.A. § 21-2-409(b)(2) remains in the Georgia Code.

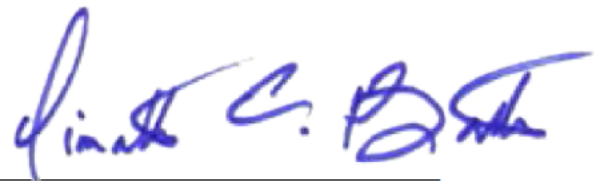
6) The Secretary further agrees, no later than 5:00 p.m. on Friday, November 30th, to provide each Election Superintendent with a notice and agrees to instruct the county election superintendents to post said notice at all polling places on election-day in a location that is viewable at the major entrance of each polling place. The notice will state that voters entitled to assistance may receive

assistance from any person of their choice who satisfies the requirements of Sec. 208 of the Voting Rights Act.

8) All future training conducted by the Secretary of State's Office shall be consistent with this Order.

9) Upon entry of this Consent Order by the Court, Plaintiffs shall be entitled to file a motion for reasonable attorneys' fees and costs from Defendant. The amount of such attorneys' fees and costs shall be determined pursuant to the procedures set forth in Northern District of Georgia Civil Local Rule 54.2 (hereinafter, L.R. 54.2) and other applicable legal authorities.

IT IS SO ORDERED THIS 29th day of November, 2018

A handwritten signature in blue ink, appearing to read "Timothy C. Batten, Sr.", is written over a horizontal line. The signature is cursive and somewhat stylized.

Hon. Timothy C. Batten, Sr.
District Court Judge

Consented to:

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