

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION**

ARKANSAS UNITED and L. MIREYA REITH

Plaintiffs,

v.

JOHN THURSTON, in his official capacity as the Secretary of State of Arkansas, SHARON BROOKS, BILENDA HARRIS-RITTER, WILLIAM LUTHER, CHARLES ROBERTS, JAMES SHARP, and J. HARMON SMITH, in their official capacities as members of the Arkansas State Board of Election Commissioners, and RENEE OELSCHLAEGER, BILL ACKERMAN, MAX DEITCHLER, and JENNIFER PRICE in their official capacities as members of the Washington County Election Commission, RUSSELL ANZALONE, ROBBYN TUMEY, and HARLAN STEE in their official capacities as members of the Benton County Election Commission, and DAVID DAMRON, LUIS ANDRADE, LEE WEBB, and MEGHAN HASSLER in their capacities as members of the Sebastian County Election Commission

Case No. 5:20-cv-05193-PKH

Defendants.

**MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR
EX PARTE TEMPORARY RESTRAINING ORDER
AND/OR PRELIMINARY INJUNCTION**

INTRODUCTION

Section 208 of the federal Voting Rights Act of 1965 (“VRA”) provides 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. For voters who are

limited English proficient, Section 208 ensures meaningful access to the franchise by permitting these voters to bring assistors with them to provide help in reading, marking and casting their ballots.

The Arkansas Election Code subverts the protections of Section 208 by making it a crime for an individual to assist more than six voters in marking and casting a ballot in an election. Section 7-5-310(b)(4)(B) of the Arkansas Election Code denies limited English proficient voters the right to vote by limiting their choice of assistor to individuals who have helped no more than six voters. Sections 7-1-103(a)(19) and (b)(1) of the Arkansas Election Code subject individuals who assist more than six voters to criminal prosecution and penalties of up to one year in jail and a fine of up to \$2,500.

Plaintiffs Arkansas United, a non-profit community membership organization, and Mireya Reith, the Executive Director of Arkansas United, seek emergency injunctive relief in the form of a temporary restraining order or, in the alternative, a preliminary injunction, to prevent Defendants from enforcing the voter assistance restrictions in the Arkansas Election Code against Plaintiffs and the members of Arkansas United who are limited English proficient voters.

Absent relief from this court, Plaintiffs and the voters they assist will be irreparably harmed. This irreparable harm includes:

- For members of Arkansas United who are limited English proficient voters, the loss of their ability to vote with the assistor of their choice as guaranteed by the federal Voting Rights Act;
- For Plaintiff Mireya Reith, exposure to criminal prosecution, jail time and money fines for assisting more than 6 voters, as she hopes to do in this election; and

- For Plaintiff Arkansas United, being forced to divert resources away from critical activities to counteract the limitations imposed on its voter assistance work, having its employees subjected to criminal prosecution and money penalties as a result of assisting voters, and being unable to fulfill its mission of helping limited English proficient voters participate in the political process by voting.

Accordingly, Plaintiffs require immediate relief. “No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964). Plaintiffs respectfully request that the Court enjoin Defendants and their agents from enforcing the voter assistance restrictions in the Arkansas Election Code and denying limited English proficient voters the assistance they need to cast their votes.

FACTUAL BACKGROUND

The last day to vote in the 2020 General Election in Arkansas is Tuesday November 3, 2020. Early voting continues through Monday, November 2, 2020. Offices on the ballot include President of the United States, U.S. Senator, U.S. Representative, State Senator, State Representative, Justice of the Supreme Court, local offices and state constitutional amendments.

The Federal Guarantee to Choose One’s Assistor in Voting

In order to vote, many limited English proficient voters require assistance navigating the process of obtaining ballots in the polling place and reading, marking and casting their ballots. Although some jurisdictions in the United States are required by federal law to provide election materials and voter assistance in languages other than English, none of these jurisdictions are

located in the State of Arkansas.¹ As a result, the overwhelming majority of Arkansas voters who are limited English proficient must bring someone with them to the polling place to help them read, mark and cast their ballots. Section 208 of the federal Voting Rights Act protects the right of every limited English proficient voter to bring an assistor of his or her choice into the voting booth, as long as the assistor is not an employer or union representative. *See* 52 U.S.C. §10508 (“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.”).

Arkansas United’s Provision of Assistance to Limited English Proficient Voters

Each year, thousands of immigrants in Arkansas become naturalized U.S. citizens and register to vote.² Approximately 83,000 Latinos are eligible to vote in Arkansas.³ Plaintiff Arkansas United is a community-based non-profit organization whose members include limited English proficient voters who choose employees of Arkansas United and others as assistors to help them vote. Exhibit 1 at ¶¶ 1-4. Arkansas United has assisted and will assist limited English proficient voters in casting their ballots in the 2020 General Election. *Id.* at ¶ 8. Plaintiff Mireya Reith, the executive director of Arkansas United, plans to serve as the chosen assistor of limited English proficient voters, including members of Arkansas United, on November 3, 2020. *Id.* at ¶ 17.

As the only non-profit organization in Arkansas that offers assistance to limited English proficient voters in the polling place, Arkansas United expects that its individual staff members

¹ *See* “Voting Rights Act Amendments of 2006, Determinations Under Section 203,” U.S. Department of Commerce, available at <https://www.justice.gov/crt/file/927231/download> (last visited 11/1/20).

² “Profiles on Naturalized Citizens: 2018 State,” U.S. Department of Homeland Security, available at <https://www.dhs.gov/profiles-naturalized-citizens-2018-state> (last visited 11/1/20).

³ “Mapping the Latino Electorate,” Pew Research Center, available at <https://www.pewresearch.org/hispanic/interactives/mapping-the-latino-electorate/iframe/> (last visited 11/1/20).

will reach their 6-voter limit on November 3, 2020 as many limited English proficient voters wait until Election Day to cast their ballots and overwhelm Arkansas United's limited capacity to provide assistance at the polls. *Id.* at ¶¶ 16-18.

The Arkansas Election Code Restricts Assistance at the Polls

The state voter assistance restrictions at issue here are:

- Arkansas Election Code Section 7-5-310(b)(4)(B), which provides: “No person other than [a poll worker or a county clerk] shall assist more than six (6) voters in marking and casting a ballot at an election.”
- Arkansas Election Code Section 7-5-310(b)(5) which provides: “It shall be the duty of the poll workers at the polling site to make and maintain a list of the names and addresses of all persons assisting voters.”
- Arkansas Election Code Sections 7-1-103(a)(19) and (b)(1), which provide: “No person shall . . . [p]rovide assistance to a voter in marking and casting the voter's ballot except as provided in 7-5-310 . . . Except as otherwise provided, the violation of any provision of this section shall be a Class A misdemeanor.”

Defendant members of the Arkansas State Board of Election Commissioners, which provides guidance and training to county election administrators, provides the following instructions to local election officials on its website:

“A person may assist no more than six voters in an election. The poll workers can only ensure that a person does not assist any more than six (6) voters at that individual polling site through maintaining a list of the names and addresses of all persons assisting voters as required by law. After the election, the county election commission can review the List of Persons Assisting Voters from all the polling locations. If it is believed that a person may have assisted more than six (6) voters, the commission can submit that information and any evidence to the Prosecuting Attorney [A.C.A. § 7-5-310(b)(4)(B)]. Any violation is a Class A misdemeanor offense punishable by fine or confinement. [A.C.A. § 7-1-103(a)(20)(C)]”⁴

⁴ FAQs, Arkansas State Board of Election Commissioners, available at <https://www.arkansas.gov/sbec/faqs/#Polling%20Places> (last visited 11/1/20).

Together, the voter assistance restrictions in the Arkansas Election Code operate to prohibit individuals from providing assistance to limited English proficient voters, under penalty of jail time and fines, and further operate to deprive limited English proficient voters of their right to choose the assistors that will help them cast their ballots when those assistors have already helped 6 other voters.

ARGUMENT

I. Legal Standard for Temporary Restraining Order

Federal Rule of Civil Procedure 65(b) authorizes a court to issue a temporary restraining order without notice to Defendants if “specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition.” Fed. R. Civ. P. 65(b)(1)(A).

The Court must consider: (1) the probability that the movant will succeed on the merits; (2) the threat of irreparable harm to the movant; (3) the balance between this harm and the injury that granting the injunction will inflict on other parties to the litigation; and (4) the public interest. *Dataphase Sys., Inc. v. C L Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981)).⁵ Likelihood of success on the merits is the most significant factor in deciding whether to grant a temporary restraining order. *Laclede Gas Co. v. St. Charles Cty., Mo.*, 713 F.3d 413, 419-420 (8th Cir. 2013); *S & M Constructors, Inc. v. Foley Co.*, 959 F.2d 97, 98 (8th Cir. 1992); *League of Women Voters of Missouri v. Ashcroft*, 336 F. Supp. 3d 998, 10002 (W.D. Mo. 2018).

⁵ *Dataphase* addressed the question whether to grant a preliminary injunction but the standards guiding issuance of a temporary restraining order are the same as those for a motion for preliminary injunction. See *S.B. McLaughlin & Co. v. Tudor Oaks Condo. Project*, 877 F.2d 707, 708 (8th Cir. 1989); *Solomon v. Campbell*, No. 4:18-CV-4001, 2018 WL 3085171 at * 3 n.4 (W.D. Ark. June 22, 2018).

II. Plaintiffs Have Standing to Seek a Temporary Restraining Order.

Article III standing has three elements: 1) injury in fact; 2) causation; and 3) redressability. Redressability requires that it is likely that a favorable decision will provide relief. *Sierra Club v. Kimbell*, 623 F.3d 549, 556 (8th Cir. 2010) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61) (1992). Causation requires a fairly traceable connection between the complained-of conduct and the alleged injury. *Iowa League of Cities v. E.P.A.*, 711 F.3d 844, 870 (8th Cir. 2013). And injury in fact requires an actual or soon-to-be invasion of a concrete, particular legal interest. *Kuehl v. Sellner*, 887 F.3d 845, 850 (8th Cir. 2018).

Article III standing applies to both individuals and organizations. *See Granville House, Inc., v. Dept. of Health and Human Serv.*, 715 F.2d 1292, 1297-98 (8th Cir. 1983) (applying Article III requirements of injury in fact, causation, and redressability to nonprofit corporation and finding standing). Moreover, organizations do not have a higher burden in proving standing. *See e.g., OCA-Greater Houston v. Texas*, 867 F.3d 604, 612 (5th Cir. 2017).

A membership organization has standing if its individual members would otherwise have standing. *Nat'l Fed'n of Blind of Missouri v. Cross*, 184 F.3d 973, 981 (8th Cir. 1999). An organization also has standing if an unlawful action frustrates the organization's mission or if the organization spends time or money responding to the unlawful action. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-379 (1982); *superseded on other grounds by statute* 42 U.S.C. § 3613(a)(1)(A).

Arkansas United has suffered injury in fact as a result of having to divert its resources, having its employees exposed to criminal prosecution and penalties for exceeding the 6-voter limit, and having its mission thwarted. Exhibit 1 at ¶¶ 17-19.

The members of Arkansas United who are limited English proficient voters and who want to be assisted by the assistor of their choice are injured in fact when they do not vote at all, or vote without an assistor, or vote without the assistor of their choice as a result of the Arkansas voter assistance restrictions. *Id.* at ¶ 29.

Plaintiff Mireya Reith, as an individual who assists limited English proficient voters as their chosen assistor, suffers injury in fact when she personally is exposed to criminal prosecution and penalties for exceeding the 6-voter assistance limit. *Id.* at ¶¶ 17-18.

Plaintiffs' injuries are caused by the Arkansas Election Code restrictions on voter assistance. Plaintiff Arkansas United, as the only non-profit organization in the state that provides voting assistance at the polling place to limited English proficient voters, must divert its limited resources, and refrain from fulfilling its mission of assisting voters, precisely because of the statutory voter assistance restrictions. *Id.* at ¶¶ 19-20, 29. Plaintiff Mireya Reith, who assists voters in her role as Executive Director of Arkansas United, is directly threatened with criminal prosecution and penalties for exceeding the 6-voter limit by the Arkansas Election Code restrictions. *Id.* at ¶¶ 17-18. Finally, members of Arkansas United who are limited English proficient voters are prevented from using the assistors of their choice by the Arkansas Election Code restrictions when those assistors have already helped 6 voters. Exhibit 1 at ¶ 29.

Plaintiffs' injuries are redressable by the injunction they seek in this case. If the Court enjoins Defendants from enforcing the unlawful Arkansas Election Code restrictions on voter assistance, Arkansas United will be able to fulfill its mission and more efficiently spend its resources on its Get Out the Vote activities by having its available assistors help more than 6 voters each; Arkansas United members will exercise their right to use the assistors of their choice; and

Plaintiff Reith will not risk criminal prosecution and penalties as a result of assisting more than 6 voters. *Id.* at ¶¶ 28-31.

III. Plaintiffs are Likely to Succeed on the Merits.

Here, where Plaintiffs seek a preliminary injunction to enjoin the enforcement of state statutes, the district court applies the “likely-to-prevail” test. *D.M. by Bao Xiong v. Minn. State High Sch. League*, 917 F.3d 994, 999-1000 (8th Cir. 2019). “While no one factor is dispositive, the likelihood of success on the merits is most important.” *Self Advocacy Sols., N.D. v. Jaeger*, No. 3:20-cv-00071, 2020 WL 2951012, at *7 (D.N.D. June 3, 2020) (citing *Brady v. Nat’l Football League*, 650 F.3d 785, 789 (8th Cir. 2011)). Plaintiffs’ claim that the Arkansas Election Code’s voter assistance restrictions are preempted by Section 208 of the Voting Rights Act is likely to succeed in light of the plain language of both statutes and the clear contradiction between state and federal law.

A. The Plain Language of Section 208 of the VRA Preempts the Voter Assistance Restrictions in the Arkansas Election Code.

The voter assistance restrictions in the Arkansas Election Code conflict with and are preempted by Section 208 of the federal VRA and thus violate the Supremacy Clause, Article VI, Paragraph 2 of the U.S. Constitution.

Section 208 provides 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[.]” 52 U.S.C. 10508. There are only two limitations: a voter may not be assisted by (1) the voter’s employer, or (2) an officer or agent of the voter’s union. The VRA defines the terms “vote” and “voting” to include:

[A]ll action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this chapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted

properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

52 U.S.C. § 10310.

By contrast, Section 7-5-310(b)(4)(B) of the Arkansas Election Code imposes a restriction not found in federal law: “No person other than [a poll worker, the county clerk during early voting, or a deputy county clerk during early voting] shall assist more than six (6) voters in marking and casting a ballot at an election.” Sections 7-5-310(b)(5), 7-1-103(a)(20) and 7-1-103(b)(1) require poll workers to maintain a list of persons who assist voters and these provisions impose criminal penalties for assisting more than six voters in an election.

Under federal law, a limited English proficient voter has the right to receive assistance from any individual who is not an employer or union representative, including the right to receive assistance from an individual who has already assisted six voters. Under state law, the voter cannot receive assistance from an individual who has already assisted six voters and the assistor commits a crime by helping the voter. In the situation in which an assistor has already assisted six voters, what federal law authorizes, state law prohibits.

Federal preemption doctrine holds that “[s]tate laws are preempted when they conflict with federal law. . . . This includes cases where ‘compliance with both federal and state regulations is a physical impossibility,’ . . . and those instances where the challenged state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]’” *Arizona v. United States*, 567 U.S. 387, 399 (2012) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)).

Here, both types of conflict preemption are present. First, the voter assistance restrictions in the Arkansas Election Code make it an “impossibility” for a limited English proficient voter to choose an assistor permitted by Section 208 of the VRA when that assistor has already helped six

other voters. *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963). By limiting a right created by the federal Voting Rights Act, the Arkansas Election Code “creates a conflict with the plan Congress put in place.” *Arizona v. United States*, 567 U.S. at 403.

The Fifth Circuit, in striking down a Texas limitation on voting assistance as preempted by the Voting Rights Act, compared the “unambiguous language” of Section 208 of the VRA to the challenged provision in the Texas Election Code and concluded that “[Texas’] limitation on voter choice . . . impermissibly narrows the right guaranteed by Section 208 of the VRA.” *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614-15 (5th Cir. 2017) (invalidating state law requirement that interpreter chosen by the voter must be registered to vote in the same county as the voter).

Similarly, in *Democracy Now North Carolina v. North Carolina State Bd. of Elections*, a North Carolina district court held that plaintiffs were likely to succeed on the merits of their claim that Section 208 preempted a North Carolina law that restricted who may assist voters in hospitals, clinics, nursing homes, or rest homes. No. 1:20CV457, 2020 WL 4484063, at *60 (M.D.N.C. Aug. 4, 2020) (invalidating state law that required voter needing assistance to “rely on either a near relative, a legal guardian, or a [multipartisan assistance team] if they are available before they may choose any other person to assist them”). The court reasoned that the challenged state statute’s limitation on assistance “does not allow Plaintiff Hutchins to choose the person who will assist him [and thus] these regulations impermissibly narrow Section 208’s dictate that a voter may be assisted “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.” *Id.* (emphasis in original).

A federal district court in Michigan also denied a motion to dismiss a voter assistance lawsuit on the grounds that Plaintiffs had stated a preemption claim under Section 208 of the VRA, concluding:

Section 208 expressly provides 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.” 52 U.S.C. § 10508. But the Absentee Ballot Law restricts who a voter may choose to assist them in voting. . . . [because] unless the person is a member of the voter's household or family, or an elector registered in Michigan, a voter cannot seek his or her assistance. Section 208, on the other hand, provides that a voter may be given assistance by anyone of that voter's choice.

Priorities USA v. Nessel, 19-13341, 2020 WL 2615766, at *14 (E.D. Mich. May 22, 2020).

The Arkansas voter assistance restrictions also violate the Supremacy Clause because they “interfere with the careful balance struck by Congress” in granting voters who need assistance the right to choose their assistor. *Arizona v. United States*, 567 U.S. at 406. In a case similar to the one at hand, last week the Minnesota Supreme Court concluded that Minnesota’s voter assistance restriction was preempted by Section 208 of the VRA. *DSCC v. Simon*, No. A20-1017, 2020 WL 6302422, at *7 (Minn. Oct. 28, 2020). The voter assistance restriction at issue in *DSCC* purported to limit the number of voters an assistor was permitted to help. *Id.* The Minnesota Supreme Court held that a “plain-language comparison leads to the conclusion that Minnesota’s three-voter limit on marking assistance can be read to stand as an obstacle to the objectives and purpose of section 208 because it could disqualify a person from voting if the assistant of choice is, by reason of other completed assistance, no longer eligible. . . .” *Id.*

B. The Legislative History of Section 208 of the VRA Evinces Congressional Intent to Preempt State Voter Assistance Restrictions.

Section 208’s plain meaning is confirmed by its legislative history. That history demonstrates Congress’s clear intent to allow voters who need assistance to obtain that assistance from persons of their choice. Congress enacted Section 208 in 1982 upon finding that “[c]ertain discrete groups of citizens are unable to exercise their rights to vote without obtaining assistance

in voting including aid within the voting booth.” See S. Rep. No. 417, 97th Cong., 2d Sess. at 62 (1982) (Senate Report).

Congress considered that this need for assistance may render such groups—namely, voters who are blind, have a disability, lack a written language, or are “unable to read or write sufficiently well to understand the election material and the ballot”—more susceptible to discrimination or undue influence. *Id.*; see also H.R. Rep. No. 227, 97th Cong., 1st Sess. 14 (1981). Congress responded by providing the opportunity for these potentially vulnerable voters to turn to those whom they trusted for assistance. “To limit the risks of discrimination” and “avoid denial or infringement of the right to vote,” Congress mandated that such voters “be permitted to have the assistance of a person of their own choice” during the voting process, including within the voting booth. Senate Report at 62.

Congress also considered whether to restrict who could serve as an assistor and chose to exclude two categories of persons: employers and union representatives. In creating these two categories of excluded individuals, Congress chose to allow all others to serve as assistors. Generally, “[w]here Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent. *Hillman v. Maretta*, 569 U.S. 483, 496 (2013) (citation omitted). Thus, Section 208 should not be read to imply restrictions beyond those enumerated.

By creating new categories of individuals who are excluded from serving as assistors, beyond those established by Congress in Section 208, the Arkansas voter assistance restrictions thwart the intent of Congress to ensure that voters who need assistance have access to assistors of their choice.

IV. A Temporary Restraining Order is Necessary to Prevent Irreparable Harm.

If the Arkansas Election Code's unlawful voter assistance restrictions are not enjoined, Plaintiffs will suffer irreparable injury and that injury cannot be remedied with damages after the election.

Members of Arkansas United who are limited English proficient voters will lose the ability to exercise their right under Section 208 of the VRA to receive assistance from the persons of their choice. Exhibit 1 at ¶ 34. Plaintiff Mireya Reith will face criminal prosecution, jail time and fines for helping more than six voters. *Id.* at ¶ 17. Plaintiff Arkansas United will lose resources and the ability to fulfill its mission to empower and assist voters if the Arkansas voter assistance restrictions remain in place for this election. *Id.* at ¶ 33.

Defendants have implemented and enforced the voter-assistance restrictions in the Arkansas Election Code. Defendant members of the State Board of Election Commissioners have instructed county election commissions to “submit that information [about individuals who assist more than 6 voters] and any evidence to the Prosecuting Attorney.”⁶ Defendants Sebastian County election commissioners contacted Plaintiff Arkansas United and told the organization not to set up a table that offered assistance to voters near the polling place at the Elm Grove Community Center in Fort Smith. Exhibit 1 at ¶ 23.

Arkansas United's members who are limited English proficient voters and who wish to choose their assistors without respect to how many voters the assistors have already helped are irreparably harmed by the Arkansas Election Code voter assistance restrictions that deprive them of their federally-protected right to vote. Exhibit 1 at ¶ 34. *See League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) (“Courts routinely deem restrictions on

⁶ FAQs, Arkansas State Board of Election Commissioners, available at <https://www.arkansas.gov/sbec/faqs/#Polling%20Places> (last visited 11/1/20).

fundamental voting rights irreparable injury.” (citations omitted)), *cert. denied*, 575 U.S. 950 (2015).

The Arkansas Election Code voter assistance restrictions also have and will frustrate the mission of Arkansas United and cause Arkansas United to divert resources away from other important activities in order to respond to the unlawful restrictions. *Id.* at ¶¶ 29, 33. These lost opportunities to vote and to carry out organizational activities constitute irreparable harm. In *Kroupa v. Nielsen*, the Eighth Circuit held that lost opportunities can constitute irreparable harm, especially when they are not pecuniary in nature. 731 F.3d 813, 820-21 (8th Cir. 2013). Here, Arkansas United will lose the opportunity to educate and assist Latino and immigrant voters -- activity that lies at the core of its organizational mission. Exhibit at ¶ 29. Time spent responding to Arkansas’ voter assistance restrictions prevents Arkansas United from providing Get Out the Vote and other important services to its members. *Id.* at ¶¶ 19, 33; *see D.M. by Bao Xiong v. Minnesota State High Sch. League*, 917 F.3d 994, 1003 (8th Cir. 2019).

The looming threat of prosecution -- a threat to both the liberty and livelihood of Plaintiff Mireya Reith and other employees and volunteers of Arkansas United -- creates a substantial threat of irreparable injury if the Court does not issue an injunction. *Reprod. Health Servs. of Planned Parenthood of St. Louis Region, Inc. v. Nixon*, 428 F.3d 1139, 1144 (8th Cir. 2005) (the district court did not abuse its discretion by holding that the threat of prosecution constituted irreparable injury); *Ga. Latino Alliance for Human Rights v. Governor of Ga.*, 691 F.3d 1250, 1269 (11th Cir. 2012) (same); *Valle del Sol Inc. v. Whiting*, 732 F.3d 1006, 1029 (9th Cir. 2013) (finding a likelihood of irreparable injury because plaintiffs had demonstrated “a credible threat of prosecution” under the likely preempted state alien harboring statute); *see also St. Louis Effort for Aids v. Huff*, 996 F. Supp. 2d 798, 808-809 (W.D. Mo. 2014), *rev’d on other grounds* 782 F.3d

1016 (8th Cir. 2015) (finding the plaintiffs suffered irreparable injury where they were subject to potential fines or loss of professional licenses).

Finally, where state law is likely preempted, as it is here, the likelihood of irreparable injury is implied. The Supreme Court has already recognized that irreparable harm arises when government actors use their legal authority to intimidate persons away from actions that are otherwise legally protected. *Allee v. Medrano*, 416 U.S. 802, 814-815 (1974) (irreparable harm found, and injunctive relief warranted, where government authority intimidated plaintiffs such that plaintiffs were unable to carry on with constitutionally protected labor organizing).

V. The Balance of the Equities Favors Granting a Temporary Restraining Order.

The “balance between this [irreparable] harm and the injury that granting the injunction will inflict on other parties” also weighs heavily in favor of granting Plaintiffs’ requested relief. *Dataphase Sys., Inc.*, 640 F.2d at 113.

Here, the risk that Arkansas United members will lose their voting rights, the risk that Plaintiff Mireya Reith and other Arkansas United employees will face criminal prosecution and penalties, and the risk that Arkansas United will continue to divert resources away from its critical activities and be frustrated in fulfilling its mission greatly outweighs the burden that Arkansas and local election officials will face. Arkansas United seeks to have the State not enforce a voter-assistance restriction that is almost certainly preempted by Section 208 of the VRA. The burden on Defendants is minimal.

In fact, not enforcing the Arkansas Election Code voter assistance restrictions will bring state law into alignment with federal law, decrease the administrative and enforcement burdens on Arkansas, and facilitate a more efficient election process. The time, expense, and administrative costs of enforcing the unlawful restrictions are high. By contrast, Arkansas and its officials will

be relieved of these burdens and costs if they are required to follow the federal Voting Rights Act. Even if there were a hardship on the state (and there is not), “[a]ny potential hardship [to Arkansas] . . . pales in comparison to that imposed by unconstitutionally depriving those voters of their right to vote and to have their votes counted.” *Fla. Dem. Party v. Detzner*, No. 4:16-cv-607, 2016 WL 6090943, at *26 (N.D.Fla. Oct. 16, 2016). “The potential hardships that [Defendants and their agents] might experience are minor when balanced against the right to vote, a right that is essential to an effective democracy.” *United States v. Georgia*, 892 F. Supp. 2d 1367, 1377 (N.D. Ga. 2012).

VI. Granting a Temporary Restraining Order is in the Public Interest.

Granting a temporary restraining order that will allow limited English proficient voters to choose their assistors consistent with the Voting Rights Act is in the public interest. An injunction would protect the fundamental right to vote for thousands of voters. “It would be untenable to permit a law with a discriminatory effect to remain in operation for [an upcoming] election.” *Veasey v. Abbott*, 830 F.3d 216, 270 (5th Cir. 2016). It is always the case that “[t]he public interest . . . favors permitting as many qualified voters to vote as possible.” *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012). Enjoining the challenged provision here would do precisely that—allow qualified Arkansas voters the opportunity to cast an informed and meaningful vote.

CONCLUSION

For the reasons stated, Plaintiffs respectfully request that this court issue a temporary restraining order and/or preliminary injunction preventing Defendants from enforcing the voter assistance restrictions in Arkansas Election Code Sections 7-5-310(b)(4)(B), 7-5-310(b)(5), 7-1-103(a)(20) and 7-1-103(b)(1).

Dated: November 2, 2020

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS

***Pro hac vice applications forthcoming**

CERTIFICATE OF SERVICE

I certify that on this 2nd day of November 2020, I caused a copy of Plaintiffs' Memorandum in Support of Motion for TRO to be sent to all parties receiving CM/ECT notices in this case.

/s/ Lawrence Walker
Lawrence Walker