No. 22-2918

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARKANSAS UNITED and L. MIREYA REITH,
Plaintiffs-Appellees,

v.

JOHN THURSTON, in his official capacity as the Secretary of State of Arkansas; and 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,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Arkansas
No. 5:20-CV-5193 (Hon. Timothy L. Brooks)

Brief of Defendants-Appellants

LESLIE RUTLEDGE
Arkansas Attorney General

NICHOLAS J. BRONNI
Arkansas Solicitor General

DYLAN L. JACOBS
Deputy Solicitor General

Michael A. Cantrell
Assistant Solicitor General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-2401
Michael.Cantrell@ArkansasAG.gov

SUMMARY AND STATEMENT REGARDING ORAL ARGUMENT

The district court below wrongfully enjoined a commonsense measure permitting a person to assist six voters in the voting booth at an election, but no more. That law serves the same purposes as Section 208 of the Voting Rights Act (VRA)—to preserve the secret ballot while protecting against undue influence and voter manipulation by would-be professional voter assistants.

The district court erred in holding that Plaintiffs established standing despite the facts that Plaintiffs cannot establish an organizational injury and have not identified a single voter whose choice of an assistant was restricted. Further, Plaintiffs lack third-party standing to assert the rights of unascertainable voters, with whom they lack any close relationship.

The district court also erred in asserting jurisdiction by discovering a private right of action under Section 208 where there is none and in wrongly ignoring that Plaintiffs seek remedies different than those provided by the VRA.

Finally, the district court applied an incorrect legal standard to wrongly conclude that Section 208 implicitly preempts Arkansas's law. Applying the correct standard, Arkansas's six-voter assistance provision does not unduly burden the right to a secret ballot free from undue influence or manipulation.

Defendants submit that 15 minutes of oral argument is appropriate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Session Laws and Legislative History

Secondary Sources

STATEMENT OF JURISDICTION

The district court asserted jurisdiction under 28 U.S.C. 1331. On September 7, 2022, the district court entered its Amended Memorandum Opinion and Order, App. 495, R. Doc. 179, and Amended Judgment, App. 534, R. Doc. 180, granting in part and denying in part Plaintiffs' motion for summary judgment and denying Defendants' motion for summary judgment.

On September 8, 2022, Defendants timely filed an appeal of that order and judgment. App. 536, R. Doc. 181. This Court has jurisdiction pursuant to 28 U.S.C. 1291.

STATEMENT OF THE ISSUES PRESENTED

1. Whether the district court erred in finding that Plaintiffs carried their burden to establish standing.

> **Apposite Authority:** *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *National Federation of the Blind of Missouri v. Cross*, 184 F.3d 973 (8th Cir. 1999); *Roberts v. Wamser*, 883 F.2d 617 (8th Cir. 1989).

2. Whether the district court erred in finding a private right of action exists under Section 208.

> **Apposite Authority:** *Alexander v. Sandoval*, 532 U.S. 275 (2001); *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 586 F. Supp. 3d 893 (E.D. Ark. 2022).

3. Whether the district court erred in finding that *Ex parte Young*, 209 U.S. 123 (1908), authorizes a judicially created remedy different from those of the Voting Rights Act.

> **Apposite Authority:** *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996).

4. Whether the district court erred in concluding that Section 208 implicitly preempts Arkansas's six-voter assistance provision.

> **Apposite Authority:** 52 U.S.C. 10508; *Priorities USA v. Nessel*, 487 F. Supp. 3d 599 (E.D. Mich. 2020); S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982).

STATEMENT OF THE CASE

A. Ensuring Voting Access and Election Integrity

Arkansas's election laws are designed to make voting easy and cheating hard. To ensure ballot secrecy and prevent undue influence on voters, poll workers are responsible for ensuring that every voter is "provided the privacy to mark his or her ballot." Ark. Code Ann. 7-5-310(a)(1). By law, poll workers police who may enter a polling site, *id.* 7-5-310(a)(3), who may stay within 100 feet of a polling site, *id.* 7-1-103(a)(24), and any electioneering at or near polling sites, *id.* 7-1-103(a)(8).

Only authorized poll workers are normally allowed near a voter's booth. *Id.* 7-5-310(a)(2)(C). That said, certain voters can be accompanied in the booth by "[a] person named by the voter." *Id.* 7-5-310(b)(3), (b)(4)(A)(i). This is an exceptional accommodation created in 2003 for voters who cannot mark and cast their ballot on their own. *Id.* 7-5-310(b). 2003 Ark. Act 1308, 84th General Assembly, Reg. Sess. (Apr. 14, 2003) (amending Ark. Code Ann. 7-5-310).

To ensure the process is not exploited for improper purposes, the law was further amended in 2009 to protect against abuse of this exceptional accommodation by would-be professional voter assistants. 2009 Ark. Act 658, sec. 1, 87th General Assembly, Reg. Sess. (Mar. 27, 2009) (amending Ark. Code Ann. 7-1-103); *id.*, sec. 3 (amending Ark. Code Ann. 7-5-310). That law provides that "[n]o

person other than [an election official] shall assist more than six (6) voters in marking and casting a ballot at an election." Ark. Code Ann. 7-5-310(b)(4)(B). A person who assists more than six voters in violation of this provision commits a Class A misdemeanor. *Id.* 7-1-103(a)(19)(C), (b)(1). But Arkansas law does not subject the *voter* to any penalty. *See id.* 7-1-103(a)(19)(C) (prohibiting only "[*p*]*roviding* assistance" to more than six voters (emphasis added)).

The six-voter provision "is designed to prevent an abuse of the assistance process," including "undue influence on how the voter vote[s] their ballot." App. 239, R. Doc. 134-5 at 7; App. 312, R. Doc. 134-7 at 10; *see* App. 283, R. Doc. 134-6 at 8. It is "a structural defense," App. 239, R. Doc. 134-5 at 7, that relieves poll workers of the burden of "judg[ing] whether an assistant is there for the right reasons or wrong reasons." *Id.* Allowing individuals to enter the voting booth with an unlimited number of voters would "increase . . . greatly," App. 283, R. Doc. 134-6 at 8, the potential for fraud and undue influence and render poll workers' tasks more difficult.

B. Section 208 Protects the Right to a Secret Ballot Free From Undue Influence or Manipulation, Not a Right to Language Assistance.

The original Voting Rights Act of 1965 prohibited practices designed to frustrate African-Americans' exercise of the right to vote. First amended in 1970, Pub. L. No. 91-285, 84 Stat. 315 (1970), then again in 1975, Pub. L. No. 94-73, 89 Stat. 400 (1975), it was amended for a third time in 1982. Pub. L. No. 97-205, 96

Stat. 131 (1982). The bulk of the 1982 Amendments were modifications to existing sections of the Voting Rights Act.

In contrast, the portion of the Voting Rights Act at issue this lawsuit, Section 208, codified at 52 U.S.C. 10508, was a new provision tacked onto the end of the 1982 Amendments. It applies nationwide and was designed to protect the right to a secret ballot free from undue influence or manipulation for "blind, disabled, or illiterate persons." *See id.* (section heading titled "§ 10508. Voting assistance for blind, disabled or illiterate persons"); *see Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt' about the meaning of a statute." (quotation omitted)).

Section 208 is the product of concerns raised by the National Federation of the Blind. S. Rep. No. 97-417, 97th Cong., 2d Sess., at 62 n.207 (1982) (citing the National Federation of the Blind's concern that voting "assistance provided by election officials . . . infringes upon their right to a secret ballot"); *see* Thomas M. Boyd and Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 Wash. & Lee L. Rev. 1347, 1419 n.357 (1983). Those concerns were expressed in a letter submitted by Dr. James Gashel, Director of Governmental Affairs for the National Federation of the Blind, who explained the need to balance blind citizens' interest in voter assistance with their interest in voter

privacy. *Voting Rights Act: Hearings before the Subcommittee on the Constitution of the Senate Judiciary Committee,* United States Senate, 97th Cong., 2d Sess. Vol. 2, Appx., at 64-66 (1982). Dr. Gashel explained that until the early 1960s, assistance to blind voters was largely provided by election officials. *Id.* at 65. Typically, election personnel from each party would accompany a blind voter into the booth to assist in marking the ballot and to guard against voter manipulation or other fraudulent conduct. *Id.* But that meant sacrificing the secret ballot. *Id.* at 66. Dr. Gashel therefore urged the Senate to protect blind citizens by allowing them to have assistance while at the same time protecting their privacy. *Id.*

Congress passed Section 208 upon finding that blind, disabled, and illiterate citizens "are more susceptible than the ordinary voter to having their vote unduly influenced or manipulated." S. Rep. No. 97-417, 97th Cong., 2d Sess., at 62. Citing the National Federation of the Blind letter, the Senate Report explained that "having assistance provided by election officials discriminates against those voters who need such aid because it infringes upon their right to a secret ballot and can discourage many from voting for fear of intimidation or lack of privacy." *Id.* at 62 n.207.

The Report expressly "recognize[d] the legitimate right of any state to establish necessary election procedures, subject to the overriding principle that such procedures shall be designed to protect the rights of voters." *Id.* at 63. "State

provisions would be preempted only to the extent that they unduly burden the right recognized in [section 208], with that determination being a practical one dependent upon the facts." *Id.*

Section 208's object to protect the right to a secret ballot free from undue influence or manipulation is apparent from its plain language, which (contrary to Plaintiffs) does not guarantee any right to provide "language assistance" to people with limited English proficiency but ensures that blind, disabled, or illiterate voters can exercise discretion concerning the person who assists them in the voting booth: "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.

It is not surprising, therefore, that the 1982 Amendments (including Section 208) do *not* address "limited English proficient" voters. Rather, that phrase comes from the 1992 amendments to (the very different) Section 203 of the Voting Rights Act. *See* Voting Rights Language Assistance Act of 1992, Pub. L. No. 102-344, 106 Stat. 921 (1992), codified at 52 U.S.C. 10503(b)(3)(B) (defining "limited-English proficient" as "unable to speak or understand English adequately enough to participate in the electoral process").

Section 203's requirements—added a decade after Section 208—were expressly designed to protect "language minorities." 52 U.S.C. 10503(a). Those requirements apply exclusively to jurisdictions meeting certain demographic criteria. *See id.* 10503(b)(2) (defining covered jurisdictions in terms of population percentages of "single language minorit[ies]" who are "limited-English proficient"). But Arkansas has no Section 203-covered jurisdictions. *See* "Covered Jurisdictions," About Language Minority Rights, *U.S. Dep't of Justice* (January 4, 2022)[1] (linking to "the most recent determinations for Section 203"[2]). Thus, in contrast to Section 208's broad, national coverage, provisions of the Voting Rights Act related to "language minorities" are narrow in their statutorily prescribed geographic scope.

C. Plaintiffs Arkansas United and Mireya Reith

Plaintiffs are Arkansas United,[3] an organization that receives funds to call and text Hispanic voters, App. 42, R. Doc. 79 at 17; App 121, 133, R. Doc. 134-1

[1] https://www.justice.gov/crt/about-language-minority-voting-rights

[2] https://www.justice.gov/crt/page/1460416/download

[3] Plaintiffs produced no evidence to show that any Arkansas United member is a registered voter. In fact, the member services repeatedly described in the record are for *noncitizens* who are ineligible to vote: That is, help with "green card renewals," "Deferred Action for Child Arrivals," and "citizenship applications." App. 126-27, 170-71, R. Doc. 134-1 at 32-33, 76-77; App. 222, R. Doc. 134-4 at 3; *see also* App. 398, R. Doc. 139-23 at 3 (Fonseca "worked with Arkansas United community members to ensure that they were taking full advantage of . . . citizenship classes."); App. 399, R. Doc. 139-23 at 4 (Fonseca "assist[s] individuals [to] fill out applications for adjustment of immigration status, including applications for naturalization, temporary protected status, and deferred action."); *id.* (Fonseca

at 27, 39, and its director, Mireya Reith, who herself made no attempt to assist any voter at the polls.

1. Arkansas United disregarded its phone-banking mission to provide unneeded language assistance.

"Arkansas United has never received funding to support its assistance to limited English proficient voters in casting their ballots at the polling place." App. 5, R. Doc. 4-1 at 5; App. 133, R. Doc. 134-1 at 39, and it had no formal arrangement to provide language assistance during the 2020 general election. App. 120, R. Doc. 134-1 at 26. In fact, Arkansas United concedes that when it inquired about sending bilingual volunteers to offer assistance at the polls, it was informed that its "services were not needed because the county would handle the provision of language services to voters." App 39, R. Doc. 79 at 14.

For her part, Reith never provided language assistance at the polls because no voters lacked access to language assistance. App. 138, R. Doc. 134-1 at 44. Indeed, Reith did not assist any person in the polling place for the 2020 election. App. 102, R. Doc. 134-1 at 8; App. 202, R. Doc. 134-2 at 2. And although Arkansas United had 16 staff and volunteers, App. 112, R. Doc. 134-1 at 18—all 16 of whom were trained to provide language assistance, App 116, 142, R. Doc. 134-1 at

"help[s] Arkansas United members . . . through the complicated process of adjusting their immigration status").

22, 48—Reith conceded "[t]heir interpretation services weren't needed," either. App. 116-17, 141-42, R. Doc. 134-1 at 22-23, 47-48.

Despite the lack of any need for language assistance at the polls, on the afternoon of Election Day 2020, *see, e.g.*, App. 137, R. Doc. 134-1 at 43; App. 217, R. Doc. 134-3 at 12, Arkansas United sent a few people from its office to the nearby Springdale Civic Center in search of voters. The Civic Center was the only place that Arkansas United provided language assistance that day, App. 227-28, R. Doc. 134-4 at 8-9, but there were already three bilingual poll workers providing assistance there. App. 231, R. Doc. 134-4 at 12.

The six-voter provision did not prevent Plaintiffs from assisting any person. App. 227, R. Doc. 134-4 at 8; App. 212-13, R. Doc. 134-3 at 7-8; App. 140, R. Doc. 134-1 at 46. None of Arkansas United's staff or volunteers asked to assist more than six voters at the polls. App. 158, R. Doc. 134-1 at 64. Relatedly, Plaintiffs did not identify a single person who lacked access to the assistant of their choice. App. 213, R. Doc. 134-3 at 8, App. 140, R. Doc. 134-1 at 46. More than that, no voters were denied assistance needed to vote. App. 289, R. Doc. 134-6 at 14; App. 328, 337, R. Doc. 134-7 at 26, 35; App 342, R. Doc. 134-8 at 4.

2. Voters did not choose Arkansas United's assistance.

Besides disregarding its phone-banking mission to provide unneeded language assistance, Arkansas United cannot even claim that its mission focuses on

facilitating voters' exercise of Section 208 rights: Plaintiffs' Election Day efforts—concerning which they claim injury—did nothing to facilitate voters' *choice* of an assistant. This much is clear from what took place at the Civic Center. Voters entering the polling place encountered a poll worker who checked their voter registration. App. 225, R. Doc. 134-4 at 6. The poll worker provided a card to voters who needed assistance. *Id.* Another worker then directed each voter to a specific person who would assist them.

The voters did not *choose* Arkansas United's assistance. App. 226, R. Doc. 134-4 at 7. As Fonseca explained, the voters "didn't choose me. There was a person managing the line. . . . [H]e would direct those persons to the volunteers who were in the area at that moment. If it was me, me. If it was another one, another one." *Id.* Fonseca clarified that by "another one," she means that the person to whom the voter was directed could have been a bilingual poll worker. *Id.* She explained, "It was not like 'I prefer this person to go to this one.' It was like the one who was available, go there." *Id.*

Similarly, Gonzalez "didn't know any of the people [she] helped." App. 211, R. Doc. 134-3 at 6. She explained that voters did not choose her specifically but were directed to her by a bilingual poll worker. *Id.* They didn't say, "I want that lady," pointing to Gonzalez, nor did they "call [her] by name and say 'I want

Ms. Gonzalez to assist me.'" *Id.* Plainly, Arkansas United cannot have been injured in any effort to facilitate voters' exercise of rights under Section 208.

3. Arkansas United exerted undue influence on voters.

The danger of undue influence inherent in allowing even well-intentioned persons to accompany voters into the booth is apparent from the record, which contains an Arkansas United staff person, Gonzalez, testifying to her violation of Arkansas law while providing language assistance in the voting booth. The law provides that a person "may assist [a] voter in marking and casting the ballot according to the wishes of the voter," but he or she must do so "without any comment or interpretation," on pain of being "removed from the polling site." Ark. Code Ann. 7-5-310(b)(4)(A)(i), (ii)(a).

Gonzalez had no background in local government and did not know, for example, the functions of a county judge. App. 213, 218-19, R. Doc. 134-3 at 8, 13-14. She received no training in explaining the various positions and measures on the ballot. App. 213, R. Doc. 134-3 at 8. Despite that, Gonzalez testified that when voters didn't understand what was on the ballot, she "would explain them to the best of [her] knowledge what each position . . . did." App. 212, 213, R. Doc. 134-3 at 7, 8. More than just translating the ballot, she would "give them [her] understanding of what each of the positions that were up for election do" and "summarize as best [she] could" the ballot measures. *Id.*

After translating one of the ballot measures to a voter in the voting booth, Gonzalez explained that the voter "turned to [her and] sa[id], what does that mean? So [Gonzalez] had to say well, it's asking you if you want to vote for or against XYZ. Again, [the voter] was like, well, what does that mean, what does that do?" App. 219, R. Doc. 134-3 at 14. "To the best of [her] knowledge, [Gonzalez] tried to" answer those questions. *Id.* She relied on a flyer that she created that described each position based on general definitions that she found on the Internet. App. 213, 214, 218, R. Doc. 134-3 at 8, 9, 13.

If an election official had observed Gonzalez violating the law by providing such commentary in the voting booth, she would have been removed from the polling place for exerting undue influence under Arkansas law. Yet, because such violations can go undetected (as in Gonzalez's case), the six-voter provision is needed to ensure that improper efforts like hers do not exercise an outsized influence on great numbers of voters. This is important in Arkansas, which has a notorious, well-documented history of undue influence and manipulation of voters' choices in the voting booth. *See* Tom Glaze, *Waiting for the Cemetery Vote: The Fight to Stop Election Fraud in Arkansas* (2011) (describing Arkansas's history of "dire"

and "perniciously ignored" fraud and undue influence on voters); Jay Barth, "Election Fraud," *CALS Encyclopedia of Arkansas* (January 25, 2018).[4]

D. Background Procedural History and the Decision Below

Thirty-nine minutes before Election Day in November 2020, Plaintiffs filed a TRO/preliminary-injunction motion against two state entities (the State Board of Election Commissioners and the Secretary of State), and three Arkansas counties, alleging that the six-voter provision burdens their ability to provide assistance to "limited English proficient" voters at the polls, in purported conflict with Section 208 of the Voting Rights Act (VRA). 52 U.S.C. 10508; s*ee* App. 17, R. Doc. 35 at 3. The district court denied Plaintiffs' motion, noting "Plaintiffs have not offered any explanation why they waited until the night before the election to bring this suit. The six-person limit challenged here was added to the statute in 2009. Two presidential elections have occurred in the interim, as well as three midterm elections." App. 24; R. Doc. 35 at 10-11 (citation omitted).

Defendants moved for dismissal, arguing, among other things, that Plaintiffs lack a private right of action and that the district court lacked jurisdiction due to Plaintiffs' lack of standing and their inability to overcome Defendants' sovereign immunity. The court denied that motion. App. 50, R. Doc. 102. The case

[4] https://encyclopediaofarkansas.net/entries/election-fraud-4477/

proceeded through discovery, and the parties filed and fully briefed cross-motions for summary judgment. App. 93, R. Doc. 134.

Nearly a year later, and a mere 66 days before voting began for the 2022 General Election, the district court enjoined Defendants from enforcing Arkansas's six-voter assistance provision. App. 482-83, R. Doc. 168 at 37-38. The district court again dismissed Defendants' threshold arguments, including that Plaintiffs are not "aggrieved persons" under the VRA, are not *voters* who can claim Section 208 rights, and haven't named even a single person whose voting rights were impaired. App. 461-70, 474-76, R. Doc. 168 at 16-25, 29-31.

The court misconstrued Section 208 to apply nationwide to "limited English proficient" persons—a phrase that appears in a different section of the VRA containing requirements that apply exclusively to jurisdictions meeting certain demographic criteria. 52 U.S.C. 10503(b)(2) (defining covered jurisdictions in terms of population percentages of "single language minorit[ies]" who are "limited-English proficient"). App. 459-61, R. Doc. 168 at 14-16.

The court compounded those errors by applying an incorrect legal analysis. Continuing to apply a heightened standard, *see, e.g.*, App. 22, R. Doc. 35 at 8 (rejecting the undue-burden standard contemplated by Congress for a "straightforward conflict preemption analysis"), the court failed to effectuate Congress's intent that "[s]tate provisions would be preempted only to the extent that they unduly

burden the right recognized in [Section 208], with that determination being a practical one dependent upon the facts." S. Rep. No. 97-417, 97th Cong., 2d Sess., at 63; *see* App. 480-82, R. Doc. 168 at 35-37 (district court rejecting the Senate Report); *but see* App. 478, R. Doc. 168 at 33 (district court relying on the Senate Report).

Defendants argued that Section 208 does not contemplate unfettered voter discretion in choosing an assistant. That is because, if it did, Section 208 would invalidate even Arkansas's penal laws that conflict with, or pose and obstacle to, a voter's choice of a person incarcerated under Arkansas law. In response, the district court inconsistently concluded that Section 208 would preempt Arkansas's election laws but not its penal laws. App. 481, R. Doc. 168 at 36.

E. Clarification and Amended Order

The district court's order was also confusing. On one hand, it appeared *not* to enjoin Arkansas's 72 nonparty counties from enforcing the six-voter provision. *See* App. 483 n.15, R. Doc. 168 at 38 n.15. But it simultaneously enjoined "all persons acting in concert with" Defendants from enforcing the law, App. 483, R. Doc. 168 at 38, leaving unclear whether the nonparty county boards and their poll workers were considered to be acting "in concert with" Defendants. So Defendants moved for clarification

The district court amended its order, newly enjoining the State Board to issue a memorandum concerning the court's rulings to all county boards by September 16, 2022—a mere 38 days before voting began. App. 532 & n.16, R. Doc. 179 at 38 & n.16. Given the proximity of this deadline and the approaching election, Defendants sought an emergency stay of the injunction, which the district court denied in a text-only order. R. Doc. 184. Defendants then sought an emergency stay in this Court. Emergency Motion to Stay, Entry ID No. 5197332 (Sept. 12, 2022). This Court granted a temporary administrative stay pending decision on Defendants' motion, Order, Entry ID No. 5197422 (Sept. 13, 2022), and then granted a full stay pending appeal. Order, Entry ID No. 5202512 (Sept. 28, 2022).

SUMMARY OF THE ARGUMENT

Section 208 of the VRA sets forth a prophylactic rule that preserves the secret ballot of "blind, disabled, or illiterate" voters from undue influence or manipulation. 52 U.S.C. 10508; S. Rep. No. 97-417, 97th Cong., 2d Sess., at 62-63. The district court erred in concluding that Section 208 implicitly preempts Arkansas's six-voter assistance provision. Ark. Code Ann. 7-5-310(b)(4)(B).

Plaintiffs are not blind, disabled, or illiterate. They aren't even *voters*. Instead, Arkansas United is an organization that receives funds to call and text Hispanic voters. Arkansas United and its director assert that Arkansas's six-voter provision impairs its supposed third-party right to provide language assistance to "limited English proficient" persons. That is wrong. But even if it were true, the district court still committed several legal errors in asserting jurisdiction and enjoining the six-voter provision.

The district court committed reversible error in holding that Arkansas United has standing under the premises of a lax application of a "diversion-of-resources" theory this Court has not accepted. Further, Arkansas's six-voter provision in fact did not prevent Arkansas United from providing assistance to any person, nor do Plaintiffs identify any actual voter whose choice of an assistant was restricted. The district court erred in finding that Plaintiffs have third-party standing to assert the rights of unascertainable voters with whom they lack any close relationship.

Further, Plaintiffs have no private right of action under Section 208, and ever since *Alexander v. Sandoval*, 532 U.S. 275 (2001), judicially implied private rights of action have been extremely disfavored. Second, although purporting to enforce Section 208's statutory right, Plaintiffs do not seek the remedies provided under the VRA's remedial scheme. Rather, they improperly seek the remedies of a state-officer suit based on *Ex parte Young*, 209 U.S. 123 (1908).

On the merits, the district court erred in applying a straightforward conflict preemption analysis to wrongly conclude that Section 208 implicitly preempts Arkansas's six-voter provision. Even applying that incorrect standard, Arkansas's six-voter provision would survive scrutiny because the district court's opinion assumes an untenable categorical reading of Section 208 that would require States to afford voters absolutely unfettered discretion in the choice of an assistant. But that categorical reading is inconsistent with Section 208's text, with its legislative history, and—as the district court itself was compelled to recognize—with common sense.

When enacting Section 208, Congress expressly invoked the Supreme Court's well-established undue-burden standard for election regulations. S. Rep. No. 97-417, 97th Cong., 2d Sess., at 63. But Plaintiffs have shown no burden at all, and in any case, the six-voter provision serves Arkansas's important and compelling interests in combating fraud, preventing undue influence, and easing

burdens on poll workers. Therefore, Arkansas's six-voter provision does not unduly burden the right protected by Section 208.

STANDARD OF REVIEW

This Court "review[s] *de novo* a district court's grant or denial of summary judgment," *Rosemann v. St. Louis Bank*, 858 F.3d 488, 494 (8th Cir. 2017), "and its permanent injunction for an abuse of discretion." *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 771 (8th Cir. 2015). "A district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 564 n.2 (2014) (quotation omitted).

ARGUMENT

I. Plaintiffs lack standing.

The district court committed reversible error in holding that Arkansas United has organizational standing to bring this suit. App. 510-19, R. Doc. 179 at 16-25. Plaintiffs fail to carry their burden to establish standing at multiple points.

A. Plaintiffs' diversion-of-resources theory fails.

First, the district court erred in holding that Arkansas United has standing under a lax application of a "diversion-of-resources" theory that this Court has not accepted. The district court relied on *Havens Realty Corp. v. Coleman*, which held that an organization's alleging it "had to devote *significant* resources to identify and counteract" discriminatory housing practices was sufficient to survive a motion to dismiss. 455 U.S. 363, 379 (1982) (emphasis added). This Court applied *Havens Realty* in *National Federation of the Blind of Missouri v. Cross*, 184 F.3d 973, 976 (8th Cir. 1999). That decision held the National Federation of the Blind (NFB) lacked standing to challenge a Missouri state agency's policy prohibiting its employees from providing information to the public about services offered by consumer organizations, including NFB. *Id.* Although Missouri's policy made it more difficult for blind persons to learn about NFB's services, thus frustrating the organization's purpose and depriving it of access to clients, this Court still

concluded NFB lacked standing because it failed to show that the policy impacted the organization "in any measurable way." *Id.* at 980.

Like NFB, Arkansas United has not shown "any measurable way," *id.*, that Arkansas's six-voter provision has impacted the organization, to say nothing of causing it to divert "significant resources," *Havens Realty*, 455 U.S. at 379, from its mission. True, Plaintiffs claim Arkansas United "received a grant to make 115,563 dials/attempts to voters in Arkansas from September 1, 2020 through November 3, 2020," but that "[i]n the end, [it] only reached 76,166 dials/attempts." App. 379, R. Doc. 139-20 at 4. Yet, despite highlighting the organization's shortcoming, Plaintiffs make absolutely no effort to quantify any impact of *the six-voter provision*: That 40,000 dial/attempt shortfall simply cannot be explained by any Election Day-afternoon language assistance Arkansas United provided.

In concluding otherwise, the district court held that Arkansas's regulation of who can *enter the booth with a voter* somehow impeded the organization's *phone-banking* mission. To reach this result, the district court disregarded several important facts that add necessary context to Arkansas United's claim. It ignored, for example, that "Arkansas United has never received funding to support its assistance to limited English proficient voters in casting their ballots at the polling place," App 5, R. Doc. 4-1 at 5—but only for phone banking. App. 133, R. Doc. 134-1 at 39. It dismissed as irrelevant that Arkansas United's language services

"were not needed" by Washington County and that it had no formal arrangement to provide language assistance. App. 39, R. Doc. 79 at 14; *see* App. 117, 120, R. Doc. 134-1 at 23, 26 (Reith conceding Arkansas United's "interpretation services weren't needed."). It ignored that, despite the organization's having 16 staff and volunteers trained to provide language assistance on Election Day, App 112, 142, R. Doc. 134-1 at 18, 48, Arkansas United elected to send to the polls precisely those from among its six staff and volunteers whom it claims were assigned to phone banking. App. 380, R. Doc. 139-20 at 5; App. 112, 116-17, 141-42, R. Doc. 134-1 at 18, 22-23, 47-48.

The district court also ignored that Plaintiffs do not assert that the law—in effect since 2009, 2009 Ark. Act 658, sec. 1, 87th General Assembly, Reg. Sess. (Mar. 27, 2009)—caused it to divert any resources during the 2010, 2012, 2014, 2016, or 2018 elections. *See* App. 158, R. Doc. 134-1 at 64 (Plaintiffs knew about the law as early as 2014). In light of these facts, Plaintiffs assert that Arkansas's six-voter provision suddenly became a problem only on the afternoon of Election Day 2020—more than a decade after it was enacted—when Arkansas United disregarded its phone-banking mission by sending those on the phones to give language assistance that it had no formal agreement to provide and that, in fact, was already being provided. This constitutes, not an impairment of Arkansas United's mission sufficient to confer standing, but if anything, a self-inflicted injury. *Zimmerman v.*

City of Austin, 881 F.3d 378, 389 (5th Cir. 2018) ("[S]tanding cannot be conferred by a self-inflicted injury."); *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) ("[E]ven if self-inflicted harm qualified as an injury it would not be fairly traceable to the defendant's challenged conduct.").

The district court's conclusion that the six-voter provision caused Arkansas United to work harder to recruit volunteers is also at odds with the record below. First, Arkansas United sought to recruit large numbers of volunteers *regardless* of the six-voter provision. App. 41, R. Doc. 79 at 16; *see* R. Doc. 139 at 6 ¶ 25. Second, Plaintiffs themselves attribute the difficulty of recruiting volunteers—and even the sending of staff to the polls on Election Day—to *the pandemic*. App. 6, R. Doc. 4-1 at 6 ¶ 16 ("Due to [the] COVID-19 pandemic we have not been able to engage as many bilingual volunteers as usual, and we have been and will rely more heavily on Arkansas United Staff to provide assistance to limited English proficient voters at the polls."); App. 13, R. Doc. 4-1 at 13 ("[W]e lack capacity due to our volunteer recruitment challenges in the COVID-19 pandemic.").

Consequently, "[o]n Election Day 2020, due to the pandemic [Plaintiffs] only had about six staff and volunteers working at the Arkansas United office." App. 379, R. Doc. 139-20 at 5; *see* App. 391, R. Doc. 139-22 ¶ 18 ("Given the uncertainty with people's health, the volunteers that I had recruited and confirmed in

advance were unable to help on Election Day."). Any difficulty Arkansas United had with volunteers, then, is not "fairly . . . trace[able]" to the six-voter provision. *Simon v. E. Kentucky Welfare Rts. Org.*, 426 U.S. 26, 41-42 (1976). In any event, regardless of how many volunteers were available, Reith conceded that "[t]heir interpretation services weren't needed," anyway. App. 117, R. Doc. 134-1 at 23.

Because Plaintiffs have not shown any organizational injury, Plaintiffs lack standing.

B. Plaintiffs lack third-party standing to assert the rights of unascertainable voters.

Third-party standing has been approved only when litigants assert the rights of *known* claimants. *Kowalski v. Tesmer*, 543 U.S. 125, 131, 134 (2004). Plaintiffs fail to do this as well. No voter's rights have been impaired by Arkansas's regulation of voter assistants. The six-voter provision in fact did not prevent Plaintiffs from providing assistance to any person. App. 227, R. Doc. 134-4 at 8; App. 212-13, R. Doc. 134-3 at 7-8; App. 140-41, R. Doc. 134-1 at 45-46. Plaintiffs similarly fail to demonstrate a "close relationship" with third-party voters, and they have not established any "hindrance" to those hypothetical voters' assertion of their own rights. *Kowalski*, 543 U.S. at 131. Because Plaintiffs cannot claim to vindicate any voter's right to receive assistance from someone who has already assisted six other people, they lack standing to assert any claim under Section 208.

II. The district court erred in asserting jurisdiction below.

The district court erred in asserting jurisdiction over Plaintiffs' challenge to Arkansas's six-voter provision for two independently dispositive reasons. First, Plaintiffs have no private right of action under Section 208. Second, Plaintiffs do not seek remedies provided under the VRA, and *Ex parte Young*, 209 U.S. 123 (1908), does not authorize a judicially created remedy. Finally, Plaintiffs have shown no ongoing violation of their federal rights.

A. Plaintiffs have no private right of action under Section 208.[5]

The district court erred in finding a private right of action exists under Section 208 when it denied Defendants' motion to dismiss, App. 65-66, R. Doc. 102 at 16-17, and again when it denied Defendants' motion for summary judgment. App. 516 n.12, 524, R. Doc. 179 at 22 n.12, 30 (citing R. Doc. 102 at 12-19).[6] The lack of a private right of action is a fatal jurisdictional defect warranting dismissal for lack of subject-matter jurisdiction. *Cross v. Fox*, 23 F.4th 797, 800, 802-03 (8th Cir. 2022). Even if there were such a right of action, it does not extend to Plaintiffs' claim.

[5] The lack of a private right of action under Section 2 of the VRA is before this Court in *Ark. State Conference NAACP v. Ark. Bd. of Apportionment*, No. 22-1395.

[6] The district court mistakenly stated Defendants agree Plaintiffs have a cause of action under Section 208. App. 516 n.12, R. Doc. 179 at 22 n.12. To the contrary, Defendants have vigorously contested that claim.

1. Section 208 does not contain a private right of action.

The district court's asserted basis for jurisdiction was that Section 3 of the VRA contemplates "proceeding[s] instituted by . . . an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment." App. 66, R. Doc. 102 at 17 (quoting 52 U.S.C. 10302). The court stated that "[t]his language explicitly creates a private right of action to enforce the VRA." App. 65-66, R. Doc. 102 at 16-17. But Section 3 does not create a private right of action to enforce Section 208.

Since *Alexander v. Sandoval*, 532 U.S. 275 (2001), judicially implied private rights of action have been extremely disfavored. "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create . . . a private remedy." *Id.* at 286. If the text of the statute does not display that intent, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." *Id.* at 286-87.

Section 3 does not imply a right of action to enforce Section 208 for two essential reasons. First, even if Section 3's reference to proceedings that enforce the Fourteenth and Fifteenth Amendments' voting guarantees could be read to include proceedings that enforce *statutes* that, in turn, enforce those guarantees, it wouldn't follow that there's a cause of action to enforce Section 208. Section 3 does not

authorize aggrieved persons to institute the "proceedings" it describes; it authorizes certain remedies "*in* a proceeding instituted by . . . an aggrieved person[.]" 52 U.S.C. 10302(b) (emphasis added). Even if those remedies apply to any private suit brought to enforce federal voting-rights law, that would say nothing about whether any particular private right of action to enforce federal voting-rights law exists. Instead, all Section 3 shows is that Congress believed *some* "proceedings" of the kind it described exist.

An analogy from securities law illustrates the point. When Congress enacted a detailed procedural and remedial scheme governing "any private action arising under" the Securities Exchange Act, 15 U.S.C. 78u-4(b), courts did not think that meant Congress had impliedly authorized private suit under every provision of that statute. Instead, the Supreme Court concluded just the opposite, saying that by enacting legislation that contemplated Exchange Act suits, but not expressly authorizing suit under provisions of the Act that hadn't previously been held actionable, Congress "ratified the [existing] implied right of action" under the Act and "chose to extend it no further." *Stoneridge Inv. Partners, LLC v. Sci.-Atlanta*, 552 U.S. 148, 166 (2008). The same follows here. By (assuming Plaintiffs' interpretation of Section 3) providing remedies that apply in private voting-rights suits, but not expressly authorizing any particular private voting-rights suits, Congress ratified those voting-rights causes of action that courts had already implied,

but declined to create new ones. *See Morse v. Republican Party of Virginia*, 517 U.S.186, 289 (Thomas, J., dissenting) (contending the "most logical deduction from the inclusion of 'aggrieved person' in [Section 3] is that Congress meant to address those cases brought pursuant to the private right of action that this Court had recognized as of 1975"[7]).

The second reason why the Section 3 language the district court relied on does not imply the existence of a private right of action is that Section 208 suits in fact do not "enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. 10302. That is, a suit asserting a Section 208 claim is *not* a proceeding to "enforce the voting guarantees of the fourteenth or fifteenth amendment" but rather to enforce a prophylactic rule that goes beyond those constitutional guarantees to afford a voter discretion in the choice of a voting assistant. Plainly, authorization of a private right of action to enforce the Constitution does not authorize a private right of action to enforce a rule that goes beyond what the Constitution itself requires. *See Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 586 F. Supp. 3d 893, 910 (E.D. Ark. 2022). And as the Supreme Court recently held in *Vega v. Tekoh*, 142 S. Ct. 2095 (2022) (rejecting Section 1983 suits for *Miranda* violations), suits that enforce prophylactic rules—even if

[7] Notably, only two members of the Court rejected this view; the three who joined Justice Breyer's concurring opinion did not comment on Sections 3 and 14.

constitutionally grounded—don't enforce the Constitution. Because the district court erred in assuming otherwise, Plaintiffs fail to invoke the subject-matter jurisdiction of the courts, and this Court should reverse.

2. Any right of action does not extend to Plaintiffs because they do not purport to bring suit as voters asserting impairment of their rights.

As explained above, Plaintiffs lack a private right of action under Section 208. But even if that were no bar to Plaintiffs' action, Plaintiffs would still lack standing because Arkansas United and Director Reith are plainly not *voters* asserting an impairment of their rights. "A federal court must ask 'whether [a statute] properly can be understood as granting persons in the plaintiff's position a right to judicial relief.'" *Roberts v. Wamser*, 883 F.2d 617, 620 (8th Cir. 1989) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975) (footnote omitted)). Indeed, "the courts are limited to considering the constitutionality of a legislative act only when it is said to result in or threaten a direct injury to the party challenging the act." *Nolles v. State Comm. for Reorganization of Sch. Districts*, 524 F.3d 892, 898 (8th Cir. 2008).

If Section 3, as Plaintiffs maintain, implies a right of action to enforce Section 208, Plaintiffs cannot avail themselves of that right. Section 3 only contemplates proceedings "instituted by the Attorney General or an aggrieved person." 52 U.S.C. 10302(b). Plaintiffs are not, of course, the Attorney General, and this Court

has held that "aggrieved persons," under Section 3, are "limited to persons whose voting rights have been denied or impaired." *Roberts*, 883 F.2d at 624. Because Plaintiffs are neither agents of the Attorney General nor voters asserting impairment of their own voting rights, they lack standing to bring a Section 208 claim.

B. Plaintiffs do not seek remedies provided under the VRA, and *Ex parte Young* does not authorize a judicially created remedy.

Defendants have sovereign immunity, which Plaintiffs could avoid only under the narrow exception for state-officer suits established by *Ex parte Young*, 209 U.S. 123 (1908). But "the *Young* exception must reflect a proper understanding of its role in our federal system and respect for state courts instead of a reflexive reliance on an obvious fiction." *Idaho v. Coeur D'Alene Tribe of Idaho*, 521 U.S. 261, 270 (1997). Properly considered, *Ex parte Young* cannot save Plaintiffs' claim.

First, the VRA's detailed enforcement mechanisms contain no indication that Congress authorized anyone other than "the Attorney General or an aggrieved person," 52 U.S.C. 10302(c), to bring suit. And "where Congress has prescribed a detailed remedial scheme for the enforcement against a State of a statutorily created right, a court should hesitate before casting aside those limitations and permitting an action against a state officer based upon *Ex parte Young*." *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 74 (1996).

The VRA sets forth a complex framework for the enforcement of certain voting rights. *See* 52 U.S.C. 10301 *et seq.*; *id.* 10501 *et. seq.*; *id.* 10701 *et. seq.*

The district court contended that state-officer suits are not precluded because Section 3 of the VRA, 52 U.S.C. 10302, expressly contemplates proceedings by "aggrieved persons" to enforce the voting guarantees of the Fourteenth or Fifteenth Amendment. App. 66, R. Doc. 102 at 17.

But, even assuming for the sake of argument that Plaintiffs have a private right of action and the proceeding below under Section 208 was one to enforce the voting guarantees of the Fourteenth or Fifteenth Amendment (which are both false), Section 3 contemplates only a very narrow set of remedies to be awarded to "aggrieved persons" in such proceedings. Those remedies are, namely: to "authorize the appointment of Federal observers," to "suspend the use of tests and devices," and for the court to "retain jurisdiction." 52 U.S.C. 10302(a), (b), & (c). *None* of these remedies, including the suspension of tests and devices,[8] are the remedies Plaintiffs purport to seek in this litigation.[9]

III. Section 208 does not preempt Arkansas's six-voter assistance provision.

In drafting and amending the Voting Rights Act, Congress could have used existing civil-rights enforcement mechanisms, as it has for other major pieces of

[8] *See, e.g.*, 52 U.S.C. 10303(c) (defining "test or device" to mean "any requirement that a person . . . (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.").

[9] Plaintiffs do not sue under 42 U.S.C. 1983. *See* App. 26, R. Doc. 79 at 1.

legislation. *See, e.g.*, 42 U.S.C. 12133 (making the remedies available under the Civil Rights Act of 1964 available to any person alleging discrimination under the Americans with Disabilities Act). But Congress chose *not* to do that. Instead, it created an independent remedial scheme with a general enforcement mechanism that contemplates only the particular remedies described above. Allowing Plaintiffs to maintain a state-officer suit under *Ex parte Young* would generate a judicially created remedy of a sort that the Court has cautioned against and that Congress did not contemplate. This Court should not "cast[] aside those limitations" by "permitting an action against a state officer based upon *Ex parte Young*." *Seminole Tribe*, 517 U.S. at 74. Section 208 does not preempt Arkansas's six-voter assistance provision.

The Constitution vests States with a "broad power" to operate elections. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). Federal courts "assum[e] that the historic police powers of the States" are *not* preempted "unless that was the clear and manifest purpose of Congress." *Merck Sharp & Dohme Corp. v. Albrecht*, 139 S. Ct. 1668 (2019) (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)).

Here, Congress expressly "recognize[d] the legitimate right of any state to establish necessary election procedures, subject to the overriding principle that such procedures shall be designed to protect the rights of voters." S. Rep. No. 97-

417, 97th Cong., 2d Sess., at 63. In harmony with Section 208, Arkansas's six-voter provision is designed to protect voters right to a secret ballot free from undue influence and manipulation. Like the statute upheld in *Ray* and other cases, Arkansas's laws are well within the latitude retained by the States to regulate the field of persons who may assist voters. *See Ray v. Texas*, 2008 WL 3457021, at *7 (E.D. Tex. Aug. 7, 2008).

A. The six-voter provision is not preempted because a categorical reading of Section 208 conflicts with its text, legislative history, and common sense.

The district court wrongly concluded that the six-voter provision "facially conflicts with § 208," App. 530, R. Doc. 179 at 36, that "compliance with both [is] impossible," App. 526, R. Doc. 179 at 32, and that it "poses an obstacle" to Congress's purpose to protect the right to a secret ballot. App. 527, R. Doc. 179 at 33. But the district court's conclusion depends on a categorical interpretation of Section 208 that requires States to afford voters absolutely unfettered discretion in the choice of an assistant. That is not supported by text, legislative history, or common sense.

1. A categorical reading is inconsistent with the text.

If Congress had intended for voters to have absolutely unfettered discretion to choose an assistant, it would have written that "any voter" may be assisted by "*any* person of the voter's choice." But that's not what Section 208 says. Instead,

Section 208 provides that "any voter" may have the assistance of "*a* person of the voter's choice." 52 U.S.C. 10508 (emphasis added). *That* language does not foreclose the State's ability to regulate the class of persons from which voters may choose, but allows room for "the legitimate right of any state to establish necessary election procedures." S. Rep. No. 97-417, 97th Cong., 2d Sess., at 63.

Notably, Section 208 also does not say that any voter may be assisted by "*the* person of the voter's choice," which might suggest a right to assistance by a voter's uniquely preferred "first pick." Therefore, compliance with both Section 208 and Arkansas's six-voter provision is possible so long as at least one person of the voter's choice is permitted to assist them in the voting booth. This makes sense in light of Section 208's purpose, which is to safeguard the voter's right to a secret ballot free from undue influence or manipulation—and not, for example, to guarantee would-be professional assistants the right to accompany voters into the booth.

2. A categorical reading is inconsistent with legislative history.

The argument from Congress's use of the indefinite article is also supported by the Senate Report, which repeatedly refers to voters having the assistance of "a person of their choice" using an indefinite article but tellingly uses the definite article to refer to choosing "the candidate of their choice." S. Rep. No. 97-417, 97th Cong., 2d Sess., at 62. The difference, of course, is in how many persons of choice there can be—one or an indefinite number. If Congress had considered the choice

of a voting assistant to be like the choice of a candidate—where the chosen class is limited to one person—it would have used the same, definite language when speaking of voting assistants. But it did not. By providing only that voters have the assistance of "a person of their choice," Section 208 does not preempt the six-voter provision.

Contrary to a categorical reading, the Senate Report recognized that States may regulate "subject to the overriding principle that such procedures shall be designed to protect the rights of voters." *Id.* at 63. As explained above, Arkansas's prohibiting a person from assisting more than six voters at an election is motivated by the same concern highlighted in the Senate Report—that voters "may have their actual preference overborne by the influence of those assisting them or be misled into voting for someone other than the candidate of their choice." *Id.* at 62; *see id.* (Section 208's purpose is "to assure meaningful voting assistance and to avoid possible intimidation or manipulation of the voter"). Given its purpose to ensure meaningful voting assistance and protect voters from undue influence or manipulation, Arkansas's six-voter provision does not "unduly burden the right recognized in [Section 208]." *Id.* at 63.

3. A categorical reading is inconsistent with common sense, as the district court itself recognized.

The district court's opinion stated that with exceptions not relevant here, "Congress wrote § 208 to allow voters to choose *any assistor they want*." App.

527, R. Doc. 179 at 33 (emphasis added). Yet, later in the same opinion the district court itself was compelled to acknowledge that a categorical interpretation of the statute is simply not sustainable—as, for example, where a voter chooses as an assistant a person who is committed to the custody of a correctional institution. *See* App. 530, R. Doc. 179 at 36.

Persons who are committed to the custody of a correctional institution are unable to assist voters in the booth due to the operation of Arkansas's penal laws. *See, e.g.*, Ark. Code Ann. 5-4-402(b) ("[A] defendant convicted of a misdemeanor and sentenced to imprisonment shall be committed to the county jail or other authorized institution designated by the court for the term of his or her sentence or until released in accordance with law."). The district court's opinion assumes that such laws would *not* be preempted, *see* App. 530, R. Doc. 179 at 36—despite an inevitable facial incompatibility between them and a categorical reading of Section 208 that, in the district court's language, would "allow voters to choose *any assistor they want*." App. 527, R. Doc. 179 at 33 (emphasis added). It is no surprise, then, that the district court abandoned a categorical reading in favor of "a common-sense reading of § 208," which "suggests that any assistor chosen by a voter must be *willing* and *able* to assist" the voter. App. 530, R. Doc. 179 at 36.

But the district court failed to recognize that, just as an incarcerated person is not "*able* to assist" due to the operation of Arkansas's penal laws, so those who

disable themselves by assisting six voters are not "*able* to assist" due to the operation of Arkansas's election laws. If Section 208 can coexist with Ark. Code Ann. 5-4-402(b) (misdemeanor-commitment statute), then it can certainly coexist with Ark. Code Ann. 7-5-310(b)(4)(B) (six-voter provision). Thus, Arkansas's six-voter provision does not conflict with a principled application of the district court's "common-sense" interpretation of Section 208.

Other courts have upheld state laws that reasonably narrow a voter's choice of assistant while protecting Section 208's right to a secret ballot. *See Ray*, 2008 WL 3457021, at *7 (Section 208 "does not preclude all efforts by the State to regulate elections by limiting the available choices to certain individuals."); *Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1198 (Ill. App. 1st Dist. 2004); *DiPietrae v. City of Philadelphia*, 666 A.2d 1132, 1135-36 (Pa. Commw. Ct. 1995).

The Supreme Court's treatment of analogous, constitutional rights to make certain decisions points to the same conclusion. Consider, for example, a criminal defendant's Sixth Amendment right to "counsel of his own choice." *United States v. Gonzalez-Lopez*, 548 U.S. 140, 144 (2006) (quoting *Powell v. Alabama*, 287 U.S. 45, 53 (1932)). Although the right to counsel is fundamental to the American criminal-justice system, "[t]he Sixth Amendment right to choose one's own counsel is circumscribed in several important respects." *Wheat v. United States*, 486 U.S. 153, 159 (1988). Among other things, an attorney who is not a member of the

relevant bar or who has a previous or ongoing relationship with the government or another party is unable to represent a criminal defendant. This rule helps to ensure that the attorney is motivated to act in the criminal defendant's personal interest.

Likewise, Arkansas's six-voter provision is designed to protect voters. It helps to ensure that a voter assistant is motivated to act in the voter's individual interest in a way that a professional voter assistant providing serial assistance to numerous voters is not. Again, the State's compelling interest in election integrity—including protecting the individual voter from undue influence or manipulation—justifies any hypothetical burden posed by the six-voter provision.

In the law, as in other areas of life, choice is virtually never unlimited in the boundless way that a categorical reading of Section 208 would require. Ensuring that voters enjoy the right to a secret ballot free from undue influence or manipulation does not preclude Arkansas from regulating the voting process to accomplish that same end.

B. Arkansas's six-voter provision does not unduly burden Section 208 rights.

Rather than requiring states to categorically allow voters unfettered discretion in their choice of an assistant, Congress instead created a framework akin to Supreme Court's well-established undue-burden standard for election regulations. "In passing § 208, Congress explained that it would preempt state election laws '*only* to the extent that they *unduly burden* the right recognized in [Section 208],

with that determination being a practical one dependent upon the facts.'" *Priorities USA v. Nessel*, 487 F. Supp. 3d 599, 619 (E.D. Mich. 2020) (quoting S. Rep. No. 97-417, at 63) (emphases added); *cf. Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020) ("[W]e apply [an undue-burden standard] . . . in considering the constitutionality of a statute implicating the right to vote.").

Therefore, as with all other election-law regulations, a court analyzing a Section 208 claim appropriately "defers to the decision of the elected representatives of the state, provided the challenged regulation does not unduly burden the right to vote." *Ray v. Texas*, 2008 WL 3457021, at *7. But the district court below rejected the undue-burden test and instead applied an improperly heightened legal standard to conclude that the six-voter provision was implicitly preempted. App. 525-29, R. Doc. 179 at 31-35; *see* App. 22, R. Doc. 35 at 8 (rejecting the "undue-burden standard" for a "straightforward conflict preemption analysis"); *see also* App. 529 n.14, R. Doc. 179 at 35 n.14 (finding "the State's 'compelling interests' . . . immaterial to the Court's analysis.").

Applying the proper legal standard, the six-voter provision does not unduly burden a voter's right to a secret ballot free from undue influence or manipulation. The six-voter provision is a permissible regulation because it is "reasonable and non-discriminatory." *Ray*, 2008 WL 3457021, at *7; *see Miller v. Thurston*, 967 F.3d 727, 740 (8th Cir. 2020) (absent a severe burden, the only question is whether

Arkansas law "is reasonable, nondiscriminatory, and furthers an important regulatory interest"). Arkansas's six-voter provision does not discriminate on the basis of race, sex, age, disability, religion, political party, etc. It has not burdened any voter's right to a secret ballot. And although Arkansas need not show any compelling interest, *Wash. State Grange*, 552 U.S. at 458, the six-voter provision also serves Arkansas's important, even compelling, interests.

1. Plaintiffs have shown no burden at all.

Plaintiffs have no evidence that any voter's right to a secret ballot free from undue influence or manipulation has been burdened—to say nothing of *unduly* burdened—by the six-voter provision. Indeed, Arkansas's law has not burdened voters' Section 208 rights because it does not regulate *voters*: The six-voter provision does not subject a voter who receives assistance at the poll to any penalty whatsoever. *See* Ark. Code Ann. 7-1-103(a)(19)(C) (prohibiting only "[*p*]*roviding* assistance" to more than six voters (emphasis added)). Second, as explained above, Plaintiffs do not identify any voter whose choice of assistant was restricted by operation of the six-voter provision. As in *Nessell*, "[g]iven the lack of evidence that any voters have been affected by the limits on their choice of assistance, there is no basis for the court to conclude that [Arkansas]'s law stands as an obstacle to the objects of § 208." *Nessel*, 487 F. Supp. 3d 599, 620 (E.D. Mich. 2020), *rev'd on other grounds and remanded*, *Priorities USA v. Nessel*, 860 F. App'x 419 (6th Cir.

July 20, 2021).[10] Plaintiffs cannot point to even a single person who lacked access to assistance they needed to vote. App. 213, R. Doc. 134-3 at 8; App 139, R. Doc. 134-1 at 45-46; App. 328, R. Doc. 134-7 at 26; App. 342, R. Doc. 134-8 at 4. Therefore, the district court erred in concluding that the six-voter provision conflicts with or is an obstacle to Section 208.

2. The six-voter provision serves Arkansas's important and compelling interests in combating fraud, preventing undue influence, and easing burdens on poll workers.

Even if Arkansas's six-voter provision placed some burden on a voter's right to a secret ballot free from undue influence or manipulation (which it does not), in light of the important and compelling interests served by the law, there would be no undue burden. First, "[a] State indisputably has a compelling interest in preserving the integrity of its election process." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2347 (2021) (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364, (1997) ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials."); *Ohio Democratic Party v. Husted*, 834 F.3d 620, 635 (6th Cir. 2016)

[10] The Sixth Circuit reversed the district court only because the latter had enjoined the challenged law on other grounds. *See Priorities USA v. Nessel*, 860 F. App'x 419 (reversing the district court's preliminary injunction). Therefore, the district court's rejection of the plaintiffs' Section 208 claim remains good law.

(finding the State's interests in preventing voter fraud and increasing voter confidence by eliminating appearances of voter fraud are "undoubtedly important").

Here, the six-voter provision "is designed to prevent an abuse of the assistance process." App. 239, R. Doc. 134-5 at 7; App. 283, R. Doc. 134-6 at 8. It prevents professional voter assistants from improperly influencing "multiple people to . . . vote in a certain way for a certain candidate." App. 283, R. Doc. 134-6 at 8. Especially pertinent here, the State Board has been notified of individuals suspiciously bringing "elderly people to the polls to vote" in large numbers. *Id.* Allowing an individual to assist more than six voters would "increase . . . greatly" the threat to election integrity. *Id.*

Besides combating purposeful voter manipulation, "[e]nsuring that every vote is cast freely, without intimidation or undue influence, is also a valid and important state interest." *Brnovich*, 141 S. Ct. at 2340. This interest covers undue influence that falls short of intentional election fraud. That matters because voters who require the assistance of another person "are more susceptible than the ordinary voter to having their vote unduly influenced or manipulated." S. Rep. No. 97-417, 97th Cong., 2d Sess., at 62; *see Ray*, 2008 WL 3457021, at *5 (law furthers the State's important interests in protecting vulnerable populations from fraudulent or manipulative interference with their vote).

The assistance provided by Gonzalez—Arkansas United's "main staff person assigned to the polls," App 135, R. Doc. 134-1 at 41—perfectly illustrates this danger. With professed ignorance concerning important election-related matters, App. 213, 218-19, R. Doc. 134-3 at 8, 13-14, Gonzales nonetheless unduly influenced the choices of voters in the booth, in violation of Arkansas law. App. 212, 213, 219, R. Doc. 134-3 at 7, 8, 14; Ark. Code Ann. 7-5-310(b)(4)(A)(i), (ii)(a). As her example demonstrates, even (presumably) well-meaning assistants can improperly influence a voter's decision. The six-voter provision prevents any single person—regardless of intent—from exercising an improper influence on a substantial number of voters in an election.

Third, Arkansas's six-voter provision serves Arkansas's important interest in easing the burdens on poll workers. Conducting an election is an enormous undertaking that requires poll workers to studiously maintain the polling place and manage voters while strictly following a massive set of federal laws, state laws, and other election procedures. *See generally* App. 308-28, R. Doc. 134-7 at 6-25. Recognizing the heavy responsibilities placed on the shoulders of poll workers, Arkansas law does not further burden them with the responsibility to "judge whether an assistant is there for the right reasons or wrong reasons." App. 239, R. Doc. 134-5 at 7. Instead, the six-voter provision "is designed to be a structural defense against abuse of the process." *Id.* Given the hectic pace of Election Day, this

interest in easing the administrative burdens on Arkansas poll workers is "undoubtedly important." *Husted*, 834 F.3d at 635. Without it, election officials' fulfilling their duty to safeguard the integrity of the polls would be undeniably more difficult.

In sum, in light of the important and compelling interests served by Arkansas's six-voter provision, that law does not unduly burden a voter's right to a secret ballot free from undue influence or manipulation. And because Arkansas's law is justified by the State's compelling interest in the integrity of its electoral process, *Brnovich*, 141 S. Ct. at 2347, it would satisfy even the stricter scrutiny that is reserved for severely burdensome regulations.

CONCLUSION

For the foregoing reasons, the Court should reverse, vacate the injunction, and remand with instructions to enter judgment in favor of Defendants.

Respectfully submitted,

LESLIE RUTLEDGE
Arkansas Attorney General

NICHOLAS J. BRONNI
Arkansas Solicitor General

DYLAN L. JACOBS
Deputy Solicitor General

MICHAEL A. CANTRELL
Assistant Solicitor General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
323 Center Street, Suite 200
Little Rock, Arkansas 72201
(501) 682-2401
Michael.Cantrell@ArkansasAG.gov

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 10,939 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I also certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in 14-point Times New Roman, using Microsoft Word.

I further certify that this PDF file was scanned for viruses, and no viruses were found on the file.

/s/ Michael A. Cantrell
Michael A. Cantrell

CERTIFICATE OF SERVICE

I certify that on December 19, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

/s/ Michael A. Cantrell
Michael A. Cantrell