Nos. 22-2918, 23-1154

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)

Defendants-Appellants' Reply Brief

TIM GRIFFIN
Arkansas Attorney General

NICHOLAS J. BRONNI
Arkansas Solicitor General

DYLAN L. JACOBS
Deputy Solicitor General

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

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ARGUMENT

The judgment below rested on the district court's conclusion that Section 208 of the Voting Rights Act is privately enforceable. This Court stayed consideration of this case while it considered whether Section 2 is privately enforceable, and earlier this year concluded it is not. *See Ark. State Conf. NAACP v. Arkansas Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023). The same conclusion inescapably follows here, and the judgment below must therefore be reversed.

But even if the Court concludes otherwise, the district court's grant of summary judgment in favor of Plaintiffs must nevertheless be reversed because it applied the wrong legal standard. Section 208 does not categorically preempt reasonable State regulations of voter assistance, like Arkansas's law limiting individuals from providing assistance to more than six voters. Rather, courts must consider whether the law unduly burdens a voter's ability to choose the person who assists him. The district court failed to apply that standard, and reversal is therefore warranted.

Finally, even if the district court's judgment on the merits stands, its fee award must be reversed because the VRA does not authorize attorney's fee awards in cases brought to enforce Section 208. And even if it did, the fee award was otherwise excessive and should be further reduced.

I. Plaintiffs cannot privately enforce Section 208.

Plaintiffs' attempt to privately enforce Section 208 is indistinguishable from *Arkansas State Conference* and is squarely foreclosed. Plaintiffs appear to concede that, if *Arkansas State Conference* controls here, they cannot succeed. Instead, they seek to sidestep that precedent based on arguments that the United States Supreme Court has already rejected.

"Everyone agrees that," like Section 2, the text of Section 208 "itself contains no private enforcement mechanism." *Ark. State Conf.*, 86 F.4th at 1210. The district court instead concluded that Section 3 of the VRA "explicitly creates a private right of action to enforce" the statute, including Section 208. APP65-66, R. Doc. 102 at 16-17. But this Court held in *Arkansas State Conference* that this argument "does not work." *Ark. State Conf.*, 86 F.4th at 1213. The Court rejected the notion Section 3 implicitly "created new private rights of action for every voting-rights statute that did not have one," which would have required it to "conclude that Congress hid the proverbial elephant in a mousehole." *Id.* at 1212 (cleaned up). Instead, "[p]rivate plaintiffs can sue under statutes like [Section] 1983, where appropriate, and the Attorney General can do the same under statutes like [Section] 12" of the VRA. *Id.* at 1213.

Plaintiffs do not argue that they can succeed if *Arkansas State Conference* controls here. *See* Appellees' Br. 23 (arguing instead that the district court below,

rather than this Court in *Arkansas State Conference*, correctly decide the cause-of-action issue).[1] Instead, they attempt to sidestep the right-of-action issue altogether and argue that the Supremacy Clause provides them a standalone claim to effectively enforce Section 208 without any congressionally bestowed right of action. *See id.* 21-23. Like Plaintiffs' Section 208 argument, this does not work.

Plaintiffs do list what they label as a "Supremacy Clause" cause of action in their operative complaint. *See* APP045, R. Doc. 79 at 20. But that supposed cause of action never went anywhere in the district court. For good reason. The Supreme Court has held that "the Supremacy Clause is not the source of any federal rights, and certainly does not create a cause of action." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-25 (2015) (cleaned up). Instead, the Supremacy Clause merely "creates a rule of decision." *Id.* at 324.

The district court did not hold that Plaintiffs could proceed under a standalone cause of action created by the Supremacy Clause, as Plaintiffs now claim. It didn't reach the issue at all. Indeed, the district court rejected the State's argument that Section 208 lacks a cause of action without so much as mentioning the Supremacy Clause. *See* APP65-66, R. Doc. 102 at 16-17 (motion-to-dismiss

[1] The United States includes in its brief an argument that Section 208 is enforceable through suits under Section 1983. USA Br. 17-20. Defendants do not address those arguments because Plaintiffs did not plead a cause of action under Section 1983.

denial); APP516 n.12, 524, R. Doc. 179 at 22 n.12, 30 (citing R. Doc. 102 at 12-19). And in its summary-judgment order, the district court referenced the Supremacy Clause only as the rule of decision, not a cause of action. *See* APP525-26, R. Doc. 179 at 31-32. It held that Section 208 is privately enforceable as a matter of statutory, not constitutional law.[2] Defendants have properly appealed that issue to this Court, and *Arkansas State Conference* resolves it.

The United States makes a different argument not raised by Plaintiffs. It claims that, contrary to *Arkansas State Conference*, Plaintiffs do not need a cause of action at all to enforce the VRA. Instead, the argument goes, private parties may rely on *Ex parte Young* to seek injunctive relief against enforcement of any State laws that are contrary to any federal statute. USA Br. 11-12. The United States is mistaken in two respects.

First, the United States is mistaken that the district court embraced this argument. In its summary-judgment and motion-to-dismiss orders, the district court referenced *Ex parte Young* only in response to Defendants' arguments that Plaintiffs cannot privately enforce Section 208, and even then did not raise it as an alternative route for Plaintiffs to sue to enforce the statute. *See* APP524, R. Doc. 179

[2] The United States agrees that "[c]ontrary to plaintiffs-appellees' framing, the district court did not hold that plaintiffs have a cause of action under the Supremacy Clause." USA Br. 15 n.2.

at 30 (citing R. Doc. 102 at 12-19). The district court rejected Defendants' arguments that the VRA's explicit methods of enforcement show that Plaintiffs cannot bring a private action to enforce Section 208. *Id.* That is just what this Court recognized in *Arkansas State Conference*. *See* 86 F.4th at 1211 (noting that the existence of explicit remedies in the statute "deserves significant weight in the implied-cause-of-action calculus"); *see also Alexander v. Sandoval,* 532 U.S. 275, 290 (2001); ("The express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others."); *Does v. Gillespie*, 867 F.3d 1034, 1041 (8th Cir. 2017) ("Because other sections of the Act provide mechanisms to enforce the State's obligation . . . it is reasonable to conclude that Congress did not intend to create an enforceable right for individual [plaintiffs]"). Indeed, it would do little good for the district court to address Defendants' cause-of-action arguments at all if it thought a private right of action were unnecessary in the first place.

Second, the United States's position is squarely contradicted by *Arkansas State Conference*. There, the plaintiffs argued that Arkansas's State House districts violated Section 2's prohibition on denial or abridgment of the right to vote, and Section 2's mandate that elections be "equally open" to minority voters. 52 U.S.C. 10301; *Ark. State Conf.*, 86 F.4th at 1207. The plaintiffs there sought the same relief as here: "an injunction preventing state officials from" following State law

they allege is contrary to the VRA. *Ark. State Conf.*, 86 F.4th at 1207. And the outcome should be the same. The Attorney General can sue to enforce the VRA; the Plaintiffs here cannot. *Id.* at 1213. The United States does not even attempt to distinguish *Arkansas State Conference*. Indeed, it filed an amicus brief in that case and declined to make the argument it now raises here. And neither the panel dissent, 86 F.4th at 1218-23 (Smith, C.J. dissenting), nor the dissent from denial of rehearing, 91 F.4th 967, 970 (2024) (mem.), considered the United States' current argument as a basis for private enforcement of the VRA.

In sum, the district court's reasoning in allowing this case to proceed was explicitly rejected by *Arkansas State Conference*. The other arguments raised by Plaintiffs and the United States in an attempt to resuscitate the judgment below have been rejected by this Court or the Supreme Court. Because Section 208 is not privately enforceable, this Court must reverse the district court's judgment.

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

Arkansas's six-voter provision is not preempted by Section 208. The statutory text does not support the district court's categorical interpretation rendering unlawful any reasonable regulation of voter assistance. And common sense further underscores that Section 208 cannot be read the way the district court and Plaintiffs do. The proper legal standard instead looks to the burden imposed on voters by the

State's regulation. Here, any burden is justified by the State's strong interest in combating fraud, preventing undue influence, and easing burdens on poll workers.

A. Section 208 does not categorically preempt any state regulation of voter assistance.

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, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. 10508. The district court misread "a person of the voter's choice" to create an unlimited set of persons from which a voter can choose, subject to absolutely no oversight by State election laws. Applying that categorical interpretation, it concluded that the six-voter provision "facially conflicts with" Section 208, "compliance with both [is] impossible," and held Arkansas's law to be preempted. The district court's reading is incorrect. Instead, Arkansas may enact reasonable restrictions on voter assistance to help deter fraud and prevent undue influence. The six-voter provision does not unduly burden the right to voter assistance contained in Section 208, and the district court's contrary conclusion should be reversed.

The district court and Plaintiffs read "a person of the voter's choice" to effectively mean "any person of the voter's choice." Their reading would exclude only persons related to the voter's employer or union as a matter of federal law and leave states with no room to enact any other regulations. But if Congress had

intended that, it could have used the word "any" instead of the indefinite article "a" to effectuate that purpose. *See, e.g.*, *United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" (quoting Webster's Third New International Dictionary 97 (1976)). Perhaps that language would have provided voters with the unfettered discretion for which Plaintiffs argue. But "a person"—the language Congress chose—leaves the universe of persons from which a voter may choose as an "undetermined or unspecified particular." *McFadden v. United States*, 576 U.S. 186, 191 (2015). That language does not facially conflict with reasonable State regulations of voter-assister eligibility. Instead, it allows both State and federal law to speak to who may assist a voter and when, provided that the ultimate choice is left to the voter.

Plaintiffs read Congress's drafting choice differently. Under their reading, Section 208 leaves undetermined only the specific person any given voter may choose as an assister because "the identity of the assister will be decided by the voter." Appellees' Br. 30. But that's true under any interpretation of "a person." Because the statute leaves the ultimate choice among eligible assisters to the voter, the "identity of the assister" will always be undetermined as a statutory matter, including if Congress had written "any person of the voter's choice." Plaintiffs' reading would render meaningless Congress's deliberate use of unspecific

language. Instead, Congress's use of "a person" instead of "any person" reflects its decision to leave unspecified the ultimate universe of persons from which a voter may choose.

Background principles of statutory interpretation underscore Congress's decision. 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*, 587 U.S. 299, 311 (2019) (quoting *Wyeth v. Levine*, 555 U.S. 555, 565 (2009)). This is especially true in areas of "traditional state authority," like "the punishment of local criminal activity." *Bond v. United States*, 572 U.S. 844, 858 (2014). Indeed, federalism concerns dictate that when the text of a federal statute "is susceptible of more than one plausible reading," courts should ordinarily "accept the reading that disfavors pre-emption." *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008). And Section 208's drafting history weights against this categorical interpretation as well. *See* S. Rep. No. 97-417, 97th Cong., 2d Sess., at 63 (noting allowance for "the legitimate right of any state to establish necessary election procedures").

In an area such as elections that is heavily regulated, chiefly by states, Plaintiffs' preferred interpretation allowing for unlimited choice of voter assistance is

out of place. Indeed, the district court and Plaintiffs recognize that their categorical interpretation is unsustainable. Consider a person in State custody who is incarcerated or detained pending a criminal trial. If Section 208's preemption is as broad as Plaintiffs claim, Arkansas's penal laws could be preempted to the extent they prevent any voter from being assisted by a person of his or her choice. The same could be true of a member of the Arkansas National Guard who is away on orders. Anytime the State places an obstacle in the way of a voter's choice of assister, it runs afoul of a categorical reading of Section 208.

Plaintiffs and the district court attempt to avoid this debacle by effectively adding words to the statute. According to the district court, "a common-sense reading of § 208 suggests that any assister chosen by a voter must be *willing* and *able* to assist" the voter. APP530, R. Doc. 179 at 36. Plaintiffs similarly argue that "Congress is not required to name and specifically exclude persons who may be unavailable to assist voters." Appellees' Br. 30. The United States likewise argues that "States can have laws that indirectly impact a voter's choice of assister" that result in "the practical unavailability of the assister," as opposed to "laws that directly regulate voter assisters." USA Br. 25.

But Section 208 does not say "any person who is willing and available." Its text makes no distinction between whether the State's placing of an obstacle in the way of a voter's choice is direct or indirect. And it provides no rule of decision for

a court to apply in deciding whether a voter's chosen assistant is "willing and available," or if a State's restriction of a voter's choice is "direct" or "indirect." Plaintiffs thus argue for a categorical reading where it suits them and ignore the practical and interpretive problems that flow from that reading. On the other hand, the State's more straightforward reading of "a person" accounts for various reasons why a person may not be able to serve as an assister. These include indirect causes like unavailability due to incarceration, deployment, or downstream effects of reasonable State election regulations like the six-voter provision. Neither the district court nor Plaintiffs provide any textual basis for why the State may permissibly narrow the universe of potential assisters in some ways but not others.

Aside from the text of the statute, Plaintiffs raise various arguments against applying the undue-burden standard called for in Section 208's drafting history. They chiefly claim that the undue-burden standard, primarily employed under the Supreme Court's *Anderson-Burdick* framework, postdates Section 208's enactment. Appellees' Br. 33. But this ignores the fact that the Supreme Court's case law prior to that already involved considering the burdens and government interests in reviewing the constitutionality of election laws. *See, e.g.*, *Williams v. Rhodes*, 393 U.S. 23, 31 (1968) ("The State here failed to show any 'compelling interest' which justifies imposing such heavy burdens on the right to vote[.]"); *Storer v. Brown*, 415 U.S. 724, 730 (1974) ("assess[ing] realistically whether the

law imposes excessively burdensome requirements upon independent candidates"); *id.* at 746 (perceiving "no sufficient state interest" in the election law at issue). The modern undue-burden standard evolved from caselaw that Congress was doubtless aware of. So application of that standard to Section 208 is far from an anachronism.

Plaintiffs' other main objection is that applying the undue-burden standard from the Supreme Court's elections case law is contrary to various preemption case law. Appellees' Br. 35. But that argument begs the question of what standard Congress intended to impose on States. Where Congress acts with express intent to categorically preempt State law or to occupy a regulatory field, a balancing test such as the one called for in the Senate Report is surely out of place. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 14 (2013) (holding preempted state law that ran afoul of express requirements of NVRA). Arkansas's argument is not that federal preemption law must give way to compelling State interests in regulating elections; rather, in enacting Section 208 Congress did not intend to impose the categorical preemption that the district court employed.

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

Section 208 preempts State laws regulating voter assistance only to the extent they unduly burden a voter's ability to choose the person who will assist him. States may enact reasonable regulations which have the effect of reducing the total

universe of eligible individuals from which a person may choose an assister. If this Court reaches the merits and rejects Plaintiffs' categorical interpretation of Section 208, it should remand for the district court to assess Plaintiffs' claims under the undue-burden standard.

Plaintiffs claim that the State's interpretation of Section 208 would mean that it could "ban all assisters, as long as it leaves two individuals from which the voter can choose." Appellees' Br. 30. That's incorrect. Arkansas's position is instead that the undue-burden standard called for in the Senate Report provides a backstop against State encroachment on a voter's rights under Section 208. *See* Opening Br. 29-34. The Report explains 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 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."); *Priorities USA v. Nessel*, 487 F. Supp. 3d 599, 619 (E.D. Mich. 2020), *rev'd on other grounds and remanded*, *Priorities USA v. Nessel*, 860 F. App'x 419 (6th Cir. 2021) ("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.'" (quoting S. Rep. No. 97-417, at 63)).

Under the district court's reading, neither the burden imposed by a State's regulation on voter assistance nor its reason for doing so matters. APP525-29, R. Doc. 179 at 31-35; *see* APP22, R. Doc. 35 at 8 (rejecting the "undue-burden standard" for a "straightforward conflict preemption analysis"); *see also* APP529 n.14, R. Doc. 179 at 35 n.14 (finding "the State's 'compelling interests' . . . immaterial to the Court's analysis."). Plaintiffs don't dispute that Arkansas has a compelling interest in preventing and deterring voter fraud and undue influence by assisters. *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 684 (2021) ("A State indisputably has a compelling interest in preserving the integrity of its election process." (quotation omitted)).

Plaintiffs also don't point to evidence that the six-voter provision—which has been effect for over a decade—has unduly burdened any voter's ability to receive requested assistance. Indeed, Plaintiffs don't point to any evidence that any Arkansas voter failed to receive assistance because of Arkansas's law. *See* APP213, R. Doc. 134-3 at 8; App 139, R. Doc. 134-1 at 45-46; APP328, R. Doc. 134-7 at 26; APP342, R. Doc. 134-8 at 4. To the contrary, the only evidence they point to is testimony from a single self-serving declaration that Arkansas United's staff ultimately that only says that Arkansas United did not provide language

assistance to some number of voters who called asking about it. *See* Appellees' Br. 14 (citing APP378-379, R. Doc. 139-20 at 2-3, ¶¶ 5-7); *id.* 33 n.33. Absent from that testimony is any indication that these unspecified voters wished to choose any particular person on Arkansas United's staff to assist them in voting, or even that these voters cared who it was that provided them with language assistance, so long as they received it from someone who was available. That is a far cry from undermining "Section 208's purpose of protecting voters from having to choose between voting with poll workers or not voting at all." Appellees' Br. 30.

Because the district court concluded that the six-voter provision is preempted by Section 208 under its categorical reading of the statute, it did not make any factual findings about the extent to which anyone's right to voter assistance has been burdened by the six-voter provision. Whether Plaintiffs' proffered evidence is enough to create a triable issue of fact should be considered by the district court in the first instance. If the Court concludes that Section 208 is privately enforceable, it should therefore reverse with instructions to apply the proper legal standard on remand.

III. The district court erred in awarding attorney's fees and costs.

The district court erred in awarding Plaintiffs $103,030.43 in attorney's fees and costs. SAPP94, R. Doc. 199 at 11. If this Court reverses on the merits, then Plaintiffs are no longer prevailing parties entitled to fees and costs, and the fee

award must also be reversed. *See Advantage Media, L.L.C. v. City of Hopkins*, 511 F.3d 833, 838-39 (8th Cir. 2008). Plaintiffs don't dispute this. Thus, if the Court reverses the judgment on the merits, it must reverse the fee award, too.

Statutory authority. Even setting aside the prevailing-party requirement, the district court's fee award should be reversed. First, there is no statutory basis for an attorney's fee award for a Section 208 suit.[3] The district court relied on 52 U.S.C. 10310(e), which provides for a fee award only in an "action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment." *See* SAPP87, R. Doc. 199 at 4. The statute is silent as to actions brought to enforce voting rights guaranteed by statute, rather than the Constitution. Plaintiffs claim that this statute nevertheless encompasses "any action enforcing the VRA, and also claims of VRA preemption." Appellees' Br. 38. But that would extend the fee-shifting provisions well beyond what Congress provided for.

As this Court recently noted, a plaintiff does not "enforce the voting guarantees of the fourteenth or fifteenth amendment" where it is not challenging "intentional discrimination" under the Constitution. *Ark. State Conf.*, 86 F.4th at 1213

[3] Plaintiffs argue that the State waived asserting that the VRA's fee-shifting provision cannot support an award in enforcing Section 208. Appellees' Br. 37. On the contrary, the State consistently argued below that Section 208 is not privately enforceable at all. Plaintiffs cite no authority that the State was required to reassert objections that the State had lost on the merits in a post-judgment motion in order to preserve the issue for this Court's review.

n.3 (internal quotations omitted). Plaintiffs resist this conclusion, arguing that various VRA sections, including Section 208, "protect voters' rights under the" Fourteenth and Fifteenth Amendments, and so "any action enforcing those" sections falls within the fee-shifting statute. Appellees' Br. 38. But Plaintiffs misread the language "to say that the *statute* under which the proceeding is instituted—not the proceeding itself—must enforce the voting guarantees of the fourteenth or fifteenth Amendment." *Ark. State Conf. NAACP v. Arkansas Bd. of Apportionment*, 586 F. Supp. 3d 893, 910 n.97 (E.D. Ark. 2022). They essentially rewrite the statute "to speak of 'a proceeding under any statute *that enforces* the voting guarantees of the fourteenth or fifteenth amendment.'" *Id.* While this Court noted that "[p]erhaps . . . § 2 [of the VRA] reflects an effort by *Congress* 'to enforce' the Fourteenth and Fifteenth Amendments," even that "is not free from doubt." *Ark. State Conf.*, 86 F.4th at 1213 n.3. And if it is doubtful that Section 2, which requires elections to be equally open to racial minorities, enforces constitutional voting guarantees, then Section 208's allowance for voting assistance, to which the Constitution does not speak at all, does not come close.

Aside from the text, Plaintiffs offer only two responses. They first point to decisions that are either out-of-circuit, dicta, or precede this Court's decision in *Arkansas State Conference* where attorney's fees have been awarded under various VRA sections. Appellees' Br. 39-41. But the language in those decisions, which

did not pass upon the issue now before this Court, is based on "background assumptions—mere dicta at most." *Id.* at 1215. Relying on those sort of statements is "inconsistent with how [the Court is] supposed to approach" statutory interpretation "questions today." *Id.* at 1216. The text controls.

Plaintiffs also misconstrue the State's argument that Section 208 "goes beyond the Constitution," Opening Br. 37, as contending that "Section 208 exceeds congressional authority." Appellees' Br. 41. That's not the State's argument. Whether Section 208 falls within Congress's remedial authority under Section 5 of the Fourteenth Amendment is a separate question from whether Section 208 itself proscribes conduct prohibited by the Constitution. Plaintiffs don't contend that regulating voter assistance is a constitutional issue, nor could they. Arkansas's argument is not that Congress cannot enact statutes providing voting guarantees in addition to those secured by the Constitution. The point is that Congress, in the statute relied on here, did not choose to authorize attorney's fee awards in suits enforcing statutory guarantees. Because the district court erred in interpreting the VRA's fee-shifting provision as applying to suits to enforce Section 208, its award must be reversed.

Excessive award. The fee awarded by the district court is also excessive on multiple fronts. *See* Opening Br. 37-44. Most importantly, the district court erred in awarding Plaintiffs attorney's fees related to their *failed* preliminary-injunction

effort, which was filed "less than two hours before Election Day." R. Doc. 35 at 3. The Supreme Court is poised to decide *Lackey v. Stinnie*, No. 23-621, which was argued earlier this month. That case presents questions related to the import of preliminary-injunction decisions in deciding when and to what degree a plaintiff is a prevailing party entitled to an award of attorney's fees. The Court's decision could clarify the standard that should be applied to Plaintiffs' preliminary-injunction-related fees. Therefore, Arkansas respectfully suggests that, if this Court reaches the merits and affirms the district court's decision, it hold a decision on Plaintiffs' fee award until after the Supreme Court's decision in *Lackey*.

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,

TIM GRIFFIN
Arkansas Attorney General

NICHOLAS J. BRONNI
Arkansas Solicitor General

DYLAN L. JACOBS
Deputy Solicitor General

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

CERTIFICATE OF COMPLIANCE

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

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/s/ Dylan L. Jacobs
Dylan L. Jacobs

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I certify that on October 30, 2024, 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.

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