No. 25-890

In the Supreme Court of the United States

ARKANSAS UNITED and L. MIREYA REITH,
Petitioners,

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,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION

TIM GRIFFIN
Arkansas Attorney General
AUTUMN HAMIT PATTERSON
Solicitor General
Counsel of Record
Noah P. Watson
Deputy Solicitor General
OFFICE OF THE ARKANSAS ATTORNEY GENERAL
101 West Capitol Avenue
Little Rock, Arkansas 72201
(501) 682-6302
autumn.patterson@arkansasag.gov

Counsel for Respondents

QUESTIONS PRESENTED

1. Whether private plaintiffs who want to assist voters in violation of a state law designed to prevent undue influence have an equitable cause of action or can maintain a suit in equity to enforce § 208 of the Voting Rights Act, even though other enforcement mechanisms exist and plaintiffs did not assert an equitable argument until their appellate oral argument.

2. Whether private plaintiffs who want to assist voters in violation of a state law designed to prevent undue influence have a private cause of action under § 208 of the Voting Rights Act.

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BRIEF IN OPPOSITION

The petition fails across the board. Not only does it advance arguments unraised in Petitioners' panel briefing, but it also divines a circuit split based, in part, on a case that even Petitioners acknowledge "did not directly review whether Section 208 allowed for a private right of action." Pet. 15. Petitioners' other cited cases likewise do not address the second question presented, and Petitioners fail to cite any cases to support their claim that a circuit split exists on the first question presented.

Even if the petition identified a circuit split, this case would be an incredibly poor vehicle for resolving it. That's because Petitioners failed to develop the arguments below and resolving the questions presented here would not be outcome determinative because the preemption claim is meritless. And despite Petitioners' rhetoric, denying the petition will not prevent voters from receiving needed voting assistance. Even though the challenged law has been on the books since 2009, Petitioners have no evidence—even though discovery has been completed—that a single voter has been unable to vote with the assister of his or her choice. The Court should therefore deny the petition.

STATEMENT OF THE CASE

A. Statutory Framework

Arkansas's election laws are designed to make voting easy while protecting the integrity of the ballot box. To ensure ballot secrecy and prevent undue influence, Arkansas law mandates that "[e]ach voter shall be provided the privacy to mark his or her

ballot," Ark. Code Ann. § 7-5-310(a)(1), and it limits who can be near a voting booth or at a polling site, *id.* § 7-5-310(a)(2)–(3).

Arkansas law, however, also recognizes that some individuals may not be able to vote on their own due to a disability or inability to read or write. Accordingly, Arkansas allows people who "need[] assistance in casting or marking" their ballot to be assisted either (1) by a person of their choice who accompanies them to the polling place or (2) by two poll workers (one helping and one observing to ensure no manipulation). *Id.* § 7-5-310(b)(2)(A)–(B). To prevent exploitation of the law by would-be professional assisters and to protect voters from fraud, coercion, and undue influence, Arkansas amended the law in 2009 to prohibit people (other than election officials, like poll workers) from assisting "more than six (6) voters in marking and casting a ballot at an election." *See* Act 658 of 2009, § 3; Ark. Code Ann. § 7-5-310(4)(B). The law makes it a misdemeanor offense for an assister to violate the six-voter assistance limit in an election, Ark. Code Ann. § 7-1-103(a)(19), (b)(1), and additionally requires poll workers "to make and maintain a list of the names and addresses of all persons assisting voters," *id.* § 7-5-310(b)(5).

Arkansas is not alone in ensuring voters can receive needed assistance while also regulating that assistance to protect the integrity of the ballot box. *See* S. Rep. 97-417, at 64 (recognizing that "many States" were "already provid[ing] for assistance by a person of the voter's choice" in 1982). Indeed, States have long protected voters and the democratic process

in this manner. For example, Minnesota enacted its "first limit on voter assistance . . . in 1889," prohibiting a "person providing assistance in marking a ballot" from doing so for "more than six (6)" people at one election. *DSCC v. Simon*, 950 N.W.2d 280, 285 n.1 (Minn. 2020). And in 1894, Minnesota limited would-be assisters to assisting three voters per election, which remained the law in Minnesota up through at least 2020. *Ibid.*

Against this backdrop and "recogniz[ing] the legitimate right of any state to establish necessary election procedures," S. Rep. 97-417, at 62, Congress enacted § 208 of the Voting Rights Act (VRA) in 1982. That provision provides:

> Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by *a* person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union.

52 U.S.C. § 10508 (emphasis added).

B. Factual Background and Procedural History

1. The district court granted summary judgment for Plaintiffs who challenged a decade-old state law the night before Election Day.

Despite Arkansas's six-person assistance provisions being in effect for over a decade, Arkansas United and its director sued state and county officials the night before Election Day in 2020. R. Doc. 35, at

10.[1] United sought a temporary restraining order and preliminary injunction, arguing that Arkansas's law is "preempted by Section 208 of the federal VRA and thus violate[s] the Supremacy Clause." R. Doc. 4, at 9.[2] The next day, the district court opined that United was likely to succeed on the merits. R. Doc. 35, at 9. The district court, however, denied preliminary relief, concluding that the equities weighed in favor of "maintaining the status quo through the final hours of Election Day." *Id.* at 11.

At both the motion-to-dismiss and the summary-judgment stages, State Defendants argued, *inter alia*, that sovereign immunity bars United's claims. R. Doc. 87, at 17; R. Doc. 135, at 17–19. But the district court concluded that the *Ex parte Young* exception applied and allowed United to overcome State Defendants' immunity. *See* Pet. App. 78a (concluding that "the exception to sovereign immunity provided in *Ex parte Young* is applicable in this case"); Pet. App. 53a (rejecting State Defendants' argument that "*Ex parte Young* does not apply here"). State Defendants also argued that § 208 "does not provide private parties with a cause of action," R. Doc. 87, at 10, but the district court rejected that argument too. It concluded that a different section of the VRA (52 U.S.C. § 10302) "explicitly creates a private right of action to enforce the VRA." Pet. App. 85a; *see* Pet. App.

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[1] Cole Jester should be substituted for John Thurston, because Mr. Jester is Arkansas's current Secretary of State. *See* S. Ct. Rule 35.3.

[2] Like the panel decision, this brief refers to Arkansas United and its director collectively as "United." Pet. App. 7a.

43–44a (concluding United is an "aggrieved person" under § 3 of the VRA, so can "sue under § 208").

On the merits, the district court ultimately concluded that the six-person voter assistance provisions (but not the provision that requires poll workers to maintain a list of assisters) are preempted by § 208. Pet. App. 57a–63a. It reached this conclusion despite United's own witnesses testifying that they had no knowledge that the six-voter assistance provisions had prevented a single person from voting with the assister of their choice. *See* R. Doc. 134-1, at 45–46 (United's executive director admitting that she had no "personal knowledge" that any members were "unable to use the assister of their choice" during the election); R. Doc. 134-3, at 8 (26:14–27:3) (former United fellow testifying that there was no one she witnessed who failed to receive needed assistance in voting); R. Doc. 134-4, at 8 (27:24–28:10) (United employee testifying that she is "not aware" of someone not being assisted with interpretation); *see also* R. Doc. 134-7, at 35 (79:11–17) (Sebastian County Election Coordinator testifying that no voter was prevented from voting due to lack of assistance); R. Doc. 134-8, at 4 (54:6–14) (Benton County Election Commissioner testifying that he is unaware of anyone being denied assistance due to Arkansas's six-voter assistance provisions).[3]

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[3] Based only on a declaration from its director, United claims that it turned away approximately 100 people who asked for help voting due to the six-voter assistance provisions. Pet. 9–10 (citing R. Doc. 139-20, at 3). Yet at a deposition, United's director admitted that only one staff member or volunteer even hit the

2. The Eighth Circuit reversed, concluding Plaintiffs failed to establish they had a private right of action for their § 208 claim under the the VRA or Supremacy Clause.

State Defendants appealed the final judgment. In their initial Eighth Circuit brief, they argued, *inter alia*, that Plaintiffs lack a private right of action under § 208. R. Doc. 211, at 3. Before United filed its response, however, the parties agreed to file a joint motion to hold the appeal in abeyance pending the Eighth Circuit's decision in *Arkansas State*

six-person limit, R. Doc. 134-1, at 40, that United simply sent someone else to replace her at that location, and that the replacement did not hit the six-person limit, *id.* at 41, 43–44. She further admitted that United had additional staff and volunteers that were trained to provide voter assistance; however, they never did so because "[t]heir interpretation services weren't needed." *Id.* at 22–23. And United's director conceded that she has no "personal knowledge" of a member not getting to vote with the assister of his or her choice. *Id.* at 45–46.

United also suggests, citing the district court's opinion rather than the record, that the single employee who hit the six-person limit was forced to reject voters who chose her to assist them. Pet. 10. But that employee testified that voters did not specifically choose her to assist them; they simply wanted someone to assist them and were directed to her by a bilingual poll worker or United team member. *See* R. Doc. 134-3, at 6 (20:15–21:21). And regardless of whether United was able to assist voters, voters could receive assistance from friends, family, or bilingual poll workers, *e.g.*, *id.*; R. Doc. 134-4, at 7 (23:3–12)—which is why United could not identify a single person who was unable to vote with assistance despite the challenged Arkansas law being in effect since 2009, *see* R. Doc. 134-7, at 35 (79:16) ("No voter turned away. We will find a way for you to vote.").

Conference of the NAACP v. Arkansas Board of Apportionment, No. 22-1395. Joint Motion, No. 22-2918 (Jan. 26, 2023), at 1. The joint motion asserted that this case and *Arkansas State Conference* raised similar issues regarding whether the VRA provided a private right of action to enforce § 208 (this case) or § 2 (*Arkansas State Conference*). *Ibid.* In March 2023, the Eighth Circuit granted the joint motion and consolidated the appeal with the related appeal from the district court's attorneys-fee decision. Order, No. 22-2918 (Mar. 6, 2023).

In November 2023, the Eighth Circuit held in *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, that the VRA does not "give private plaintiffs the ability to sue under § 2." 86 F.4th 1204, 1206–07 (8th Cir. 2023). United subsequently moved for an indicative ruling from the district court in this case. United explained that, in light of the *Arkansas State Conference* decision, it would like to amend its complaint to add a claim for relief under 42 U.S.C. § 1983 because (a) the district court's earlier favorable ruling had been premised on the conclusion that United had a private right of action under the VRA and (b) State Defendants had challenged that holding in their opening appellate brief (before the case was held in abeyance). *Id.* at 2–4. The district court denied the motion, R. Doc. 220, and the parties filed new consolidated briefs regarding the merits and fee award in the Eighth Circuit, *see* Order, No. 22-918 (June 21, 2024) (striking the original opening brief and accepting consolidated brief).

In their consolidated opening brief, State Defendants argued, among other things, that United

has no private right of action to enforce § 208 based on *Arkansas State Conference* and that § 208 does not preempt Arkansas's six-voter assistance provisions. *See* Appellants' Br. 20–35. In response, United devoted only one paragraph to arguing that *Arkansas State Conference* was "wrongly decided," asserting that the VRA creates a private right of action to enforce § 208 "[f]or the reasons set out in the district court's" opinion. Appellee Br. 23. United then pointed to its complaint, arguing for the first time that it had a "cause of action . . . under the Supremacy Clause," *id.* at 22, before spending the bulk of its brief arguing that § 208 preempts Arkansas's six-voter assistance provisions. *Id.* at 24–35. State Defendants responded that the district court never held that Plaintiffs had a standalone cause of action under the Supremacy Clause "[f]or good reason": The Supreme Court had held that Clause "is not the source of any federal rights, and certainly does not create a cause of action." Reply 3 (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324–25 (2015)).

Based on the arguments made, the Eighth Circuit held, in a unanimous panel opinion, that "[l]ike the provision at issue in *Arkansas State Conference*," "the text and structure of § 208 do not create a private right of action." Pet. App. 6a. Quoting this Court's opinion in *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001), the panel explained that, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." Pet. App. 9a. That means that "Congress must have *both* created an individual right *and* given private plaintiffs the ability to enforce it." Pet. App. 9a

(citation omitted). And the panel explained that regardless of "whether § 208 creates an *individual right*," it does not create "a *private remedy*" because "the text of § 208 'itself contains no private enforcement mechanism,'" nor do other provisions of the VRA. Pet. App. 9a–10a (citation omitted).

After finding "no private right of action to enforce § 208" in the VRA, the Eighth Circuit "turn[ed] to United's next argument: whether one exists under the Supremacy Clause." Pet. 12a. It concluded United failed there too because this Court had already held that the Supremacy Clause does not create a cause of action. *Id.* (citing *Armstrong*, 575 U.S. at 324–25). Recognizing that this Court has "alluded to the possibility that preemption principles may be a source of equitable relief," it briefly concluded that such relief was unwarranted in light of § 208's enforcement structure. *Id.* Accordingly, the Eighth Circuit reversed the "grant of summary judgment for United and denial of summary judgment for the State." Pet. App. 13a.

United sought rehearing en banc, arguing the panel erred by not "address[ing] *Ex parte Young*" and by not concluding that United could "maintain a suit in equity" under *Ex parte Young*. Rehearing Pet. 8, 10. State Defendants countered that United was "seek[ing] rehearing en banc based on an argument that it failed to make in its prior briefing," including because it failed to "as much as mention *Ex parte Young*" in its panel briefing, and that the "district court invoked *Ex parte Young* to reject State Defendants' assertion of sovereign immunity, not to

hold that [United has] an equitable cause of action." Resp. to Rehearing Pet. 1, 4.

The Eighth Circuit denied the rehearing petition over a dissent. Pet. App. 108a. The dissent would have granted rehearing to consider the question of "whether the plaintiffs in this case may seek equitable relief to enjoin enforcement of a preempted state statute." *Ibid.* United now seeks this Court's review.

REASONS FOR DENYING THE PETITION

The petition is not cert-worthy. United's claimed circuit split falls apart under the slightest scrutiny, and even if there were a circuit split, this case would be an incredibly poor vehicle for resolving it. That's because United advances new arguments in its petition that it failed to properly develop below and resolving the questions presented would not be outcome determinative in this case. On top of that, the petition does not identify an important issue that requires this Court's intervention. Despite Arkansas's challenged law being on the books for over a decade, United could not muster proof that a single voter was denied assistance by a person of his or her choice. And if that were not enough reason to deny the petition, the Eighth Circuit's decision is also consistent with this Court's precedent.

I. UNITED FAILED TO SHOW THE CLAIMED CIRCUIT SPLIT EXISTS.

United wrongly claims that the Eighth Circuit has "create[ed] a sharp conflict with *every other circuit*" by holding that would-be assisters do not have a private cause of action to enforce § 208 under the VRA. Pet.

15 (emphasis added). But United cites cases from only two circuits—the Fifth Circuit and the Sixth Circuit—and none of the cases it cites held that § 208 creates a private cause of action. And while United alleges a circuit split exists regarding when an equitable cause of action is available (or when it is possible to maintain a suit in equity),[4] it failed to cite a single case to support that allegation. United has thus failed to show there is a "circuit split" on whether § 208 "contain[s] a private right of action" or on the availability of equitable relief. Pet. 17–18.

United's claimed circuit split regarding whether there is a private cause of action under § 208 does not withstand scrutiny. The Eighth Circuit has held that § 208 does not create such a private right of action, Pet. App. 6a, and United fails to identify a single circuit that has held to the contrary. Although United cites three cases from two circuits, none of those cases hold that § 208 creates a cause of action for would-be assistors like United.

In *OCA-Greater Houston v. Texas*, the state defendants challenged plaintiffs' standing and ability to overcome sovereign immunity—not whether plaintiffs had a cause of action. 867 F.3d 604, 609–14 (5th Cir. 2017). Indeed, United even concedes that *OCA-Greater Houston* "did not directly review whether

[4] Although it may be "technically incorrect" to refer to a "cause of action" when referring to a suit in equity, it is sometimes used as shorthand. *See United States v. Texas*, 97 F.4th 268, 307 n.3 (5th Cir. 2024) (Oldham, J., dissenting) (citing Samuel L. Bray & Paul B. Miller, *Getting into Equity*, 97 Notre Dame L. Rev. 1763, 1764 (2022)).

Section 208 allowed for a private right of action." Pet. 15. United nonetheless suggests the Fifth Circuit decided the issue anyway because it "stated that 'federal jurisdiction over this case is proper.'" Pet. 15 (quoting *OCA-Greater Houston*, 867 F.3d at 612). That argument flouts the well-established principle that "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 170 (2004) (quoting *Webster v. Fall,* 266 U.S. 507, 511 (1925)); *accord Johnson v. Halstead*, 916 F.3d 410, 419 n.3 (5th Cir. 2019). That argument is also misguided because whether § 208 creates a private cause of action is not a jurisdictional question. *See Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 690 (2021) (Gorsuch, J., concurring) ("the existence (or not) of a cause of action does not go to a court's subject-matter jurisdiction"); *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014) ("the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the court's statutory or constitutional *power* to adjudicate the case" (quoting *Verizon Md. Inc. v. Public Serv. Comm'n of Md.*, 535 U.S. 635, 642–43 (2002))). Accordingly, the Fifth Circuit's statement about its jurisdiction provides no indication regarding the Fifth Circuit's views about whether § 208 creates a cause of action.

The Fifth Circuit's opinion in *La Union Del Pueblo Entero v. Abbott*, 151 F.4th 273 (5th Cir. 2025) (*LULAC*), also does not support United's circuit-split claims. In that opinion, the Fifth Circuit does not say

a word about a cause of action, much less hold that § 208 creates a cause of action for would-be assistors. That is why even United admits that the Fifth Circuit did not decide "that private plaintiffs may sue under Section 208" in *LULAC*. Pet. 15–16.

The Sixth Circuit's opinion in *Nelson v. Miller*, 170 F.3d 641 (1999), is even less helpful for Plaintiffs. Not only did *Nelson* have nothing to say regarding whether § 208 creates a cause of action, but it also did not even address a claim that a state law was violating § 208. *Nelson* instead addressed (and rejected) a claim that a state law violated the Americans with Disabilities Act and the Rehabilitation Act. 170 F.3d at 644.

In short, United failed to identify a single circuit case to substantiate its claim that a circuit split exists regarding whether § 208 creates a private cause of action for would-be assistors. And United's claim that a circuit split exists regarding when equitable relief is available is even weaker. United fails to cite a single circuit case to support that alleged circuit split. Pet. 15–18.[5]

[5] In a later section, United suggests that *Nelson*'s holding that "*Ex parte Young* applies to give the federal courts jurisdiction" equates to a holding that plaintiffs have an equitable cause of action to enforce § 208. Pet. 20. That argument not only ignores that *Nelson* did not address a § 208 claim, as discussed above, but also that *Nelson* simply held that the *Ex parte Young* exception applied to allow plaintiffs to overcome immunity, not to provide plaintiffs with a cause of action. *Nelson*, 170 F.3d at 646–47; *see Mich. Corr. Org. v. Mich. Dep't of Corr.*, 774 F.3d 895, 905 (6th Cir. 2014) (Sutton, J.) ("*Ex parte Young* by itself does not

There is thus no need for this Court to grant review to provide uniformity because United has failed to substantiate its claim that there is a circuit split. And even if United had identified an actual circuit split, the issues raised in this case could benefit from further percolation.

II. THIS CASE IS A POOR VEHICLE FOR THE QUESTIONS PRESENTED.

In any event, this case is a poor vehicle for deciding the questions presented. That is for primarily two reasons. First, United raises new arguments in its certiorari petition that it failed to properly develop below. In its panel briefing, United never even cited *Ex parte Young*, much less argued that it had an equitable cause of action (or that it did not need a cause of action to maintain its suit in equity). Instead, United asserted it had a cause of action under the Supremacy Clause. And while United argued it had a private right of action under the VRA in a single paragraph, it failed to develop that argument. Second, deciding the questions presented here would not be outcome determinative. Even if the Court granted review and held that § 208 gives United a private right of action or that United has an equitable cause of action, United's claim would still fail because Arkansas's six-voter assistance provisions are not preempted.

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create such a cause of action. Put another way, *Ex parte Young* provides a path around sovereign immunity *if* the plaintiff already has a cause of action from somewhere else.").

A. United's petition advances new arguments not raised in its district-court or panel briefing.

This case is not the ideal vehicle for addressing the questions presented because United failed to properly develop and advance the arguments below that it presses here. Although United's first question presented is whether private parties "may maintain a suit in equity" to enforce § 208 and United argues that it has an equitable claim under *Ex parte Young*, Pet. i, 20, United never argued it had an equitable cause of action before the district court. Indeed, *Ex parte Young* was invoked before the district court as a possible exception to sovereign immunity; R. Doc. 97, at 17–20; R. Doc. 146, at 20–21, it was not invoked to support an argument about a cause of action sounding in equity, *see Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 74 (1996) ("the question is not whether a remedy should be created, but instead is whether the Eleventh Amendment bar should be lifted, as it was in *Ex parte Young*"); *Mich. Corr. Org.*, 774 F.3d at 905 ("*Ex parte Young* provides a path around sovereign immunity *if* the plaintiff already has a cause of action from somewhere else.").

What's more, United took actions demonstrating that it did not believe it had asserted an equitable cause of action before the district court. For example, United *joined* the motion to hold the appeal in abeyance pending a decision in *Arkansas State Conference* and, in doing so, recognized "the issue presented in this appeal"—would likely be impacted by that decision about "whether Section 2 of the Voting Rights Act is privately enforceable." Joint Mot. to Hold Appeal in

Abeyance, No. 22-2918 (Jan. 26, 2023). United thus admitted that *Arkansas State Conference* would be relevant rather than contending that what happened in that case would be immaterial because it had also asserted an equitable cause of action here. And when *Arkansas State Conference* was decided in a way that suggested United's § 208 cause-of-action arguments would fail before the Eighth Circuit, United moved for an indicative ruling from the district court that it would be allowed to belatedly amend its complaint to add a § 1983 claim, R. Doc. 211, at 1–5. If United thought it had asserted an equitable cause of action, these steps would have been unnecessary—and United certainly would have made different arguments in its Eighth Circuit briefing.

In its panel brief, United never argued that it had an equitable cause of action or that it did not need a cause of action to maintain a suit in equity. Indeed, United's brief never even mentioned *Ex parte Young*. Rather than making those arguments and citing *Ex parte Young*, United briefly argued it had "a cause of action" under the Constitution itself: "the Supremacy Clause." Appellee Br. 22. But as this Court held in *Armstrong*, "the Supremacy Clause is not the source of any federal rights and certainly does not create a cause of action." 575 U.S. at 324–25 (citations and quotation marks omitted). The Eighth Circuit thus properly rejected United's argument that the Supremacy Clause creates "a standalone private right of action." Pet. App. 12a. It did not need to conclude that United had nonetheless established it could maintain an equitable suit under *Ex parte Young*

when United neglected to include any such argument in its brief.

To be sure, United belatedly attempted to claim an equitable cause of action relying on *Ex parte Young* at oral argument (based on an argument made by an amicus). But in doing so, United admitted that it invoked *Ex parte Young* before the district court for a different purpose—to argue that its lawsuit was not "barred by sovereign immunity." Oral Arg. 15:16–15:52. And State Defendants' counsel argued that United failed to assert an equitable cause of action before the district court and had forfeited any such argument. *Id.* at 5:38–7:24, 29:12–40. It is therefore unsurprising that the panel decision does not even cite *Ex parte Young* because sovereign immunity was not at issue on appeal. The Court should therefore wait to address the first question presented in a case where the arguments were developed properly in the lower courts and after the question has percolated among the circuit courts.

The same is true regarding the second question presented. Although United at least argued in its panel brief that § 208 is privately enforceable under the VRA, it failed to develop that argument. Rather than articulate why it believes it has a cause of action under the VRA to enforce § 208, United simply pointed to "the reasons set out in the district court's" opinion and included a "see also" cite with two explanatory parentheticals. Appellee Br. 23. This case is thus also a poor vehicle to address whether § 208 gives would-be assisters a private cause of action, especially when United has failed to demonstrate a circuit split on that issue.

B. The questions presented are not outcome determinative.

This case is also not an ideal vehicle because resolving the questions presented would not change the outcome. Because § 208 does not preempt Arkansas's six-voter assistance provisions, the Eighth Circuit correctly reversed the district court. States have "broad power" to operate elections, *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008) (citation omitted), and "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes," *Storer v. Brown*, 415 U.S. 724, 730 (1974). Given the States' traditional authority to regulate in the election context, its authority is not preempted "unless that was the clear and manifest purpose of Congress," *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008). Section 208 does not reflect such a clear and manifest intent.

Section 208 allows a voter to receive assistance from "*a* person of the voter's choice," not *any* person of the voter's choice or the voter's *top* choice. 52 U.S.C. § 10508 (emphasis added); *see 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.'" (citation omitted)); *Priorities USA v. Nessel*, 487 F. Supp. 3d 599, 619 (E.D. Mich. 2020) ("Section 208 does not say that a voter is entitled to assistance from *the* person of his or her choice or *any* person of his or her choice." (emphasis in original)), *rev'd and remanded on other grounds*, 860 F. App'x 419 (6th Cir. 2021). Section 208 thus does not give voters the right to choose anyone as

an assister without any restrictions and without regard to state regulations any more than the right to counsel of one's choosing does not override state licensing regulations and ethical rules. That § 208 provides examples of some restrictions on who can be an assister does not foreclose all other limits on who voters can choose to assist them. Indeed, that is why even the district court agreed with State Defendants that voters could not insist on having an incarcerated person assist them. Pet. App. 62a. Yet the district court still wrongly concluded that state law could not narrow the universe of possible assisters to protect voters from undue influence and manipulation beyond prohibiting the voter's employer or union's agent from assisting. *Ibid.* But nothing compels courts "to read 'a person of the voter's choice' in a maximalist way that erases swaths of state election laws." *LULAC*, 151 F.4th at 292.

To the contrary, "[c]ontext and common sense counsel" against such a maximalist reading, as does the presumption against preemption. *Id.* at 292–93. And "even if the Senate Report were relevant, it would cut against preemption" too. *Id.* at 295; *see Ray v. Texas*, No. CIV.A.2-06-CV-385TJW, 2008 WL 3457021, at *7 (E.D. Tex. Aug. 7, 2008) ("The legislative history evidences an intent to allow the voter to choose *a* person whom the voter trusts to provide assistance. It does not preclude all efforts by the State to regulate elections by limiting the available choices to certain individuals."). The Senate Report not only "expressly recognize[s]" States' authority "to establish necessary election procedures . . . designed to protect the rights of voters," but also "envisions that Section

208 would have, at most, a modest preemptive effect." *LULAC*, 151 F.4th at 295 (quoting S. Rep. No. 97-417, at 61).

Therefore, § 208 does not preempt reasonable state regulations like Arkansas's six-voter assistance provisions that ensure voters have assistance free from undue influence or manipulation. This Court's review would thus not be outcome determinative in this case; United would still lose, and Arkansas would be able to continue enforcing its democratically enacted law to protect voters.

III. THE PETITION DOES NOT PRESENT IMPORTANT ISSUES THAT MERIT THIS COURT'S REVIEW.

Contrary to United's assertions, this case does not raise important questions "with significant implications for voters who need assistance to vote." Pet. 19 (emphasis omitted). Rather than undermining § 208, Arkansas's 2009 six-voter assistance law ensures that those who need assistance to vote receive that assistance without undue influence or manipulation—and it does so without hindering a voter's ability to vote. *See* R. Doc. 134-7 at 79 (testifying that no voters failed to receive assistance who needed it); R. Doc. 134-8 at 54 (same). Indeed, United has no evidence that even a single voter was unable to use the assister of his or her choice to vote. *See supra* pp. 5–6. And evidence in this case demonstrates why it is important for States to regulate would-be assisters to protect voters from undue influence. One 2020 assister acknowledged that she would go beyond merely translating ballots when she was with voters at the ballot box; instead, she would also try to explain or summarize what she

thought ballot measures meant. *See* R. Doc. 134-3, at 8, 14.

Even zooming out from the specifics of this case, United is wrong that the decision below jeopardizes voting rights for those who require assistance. Although United insists that private enforcement of § 208 is necessary, it does not dispute that § 208 has an "enforcement mechanism" "through the Department of Justice," Pet. 22, and it fails to offer any evidence that such federal enforcement is insufficient. What's more, United overlooks that the decision below does not address whether § 1983 provides a means for private enforcement of § 208.[6] United is thus wrong that the decision below necessarily "foreclose[s] any possibility of private enforcement of Section 208 in seven states." Pet. 19.

Accordingly, while whether § 208 is privately enforceable may be an important question, it is not important to answer that question here when another private enforcement mechanism may be available. And there is no urgency in answering that question when deferring will allow beneficial percolation and will not have deleterious practical consequences. The six-voter assistance law has been in effect since 2009,

[6] In a footnote, United "suggest[ed] that the Court hold this case and this petition in abeyance" pending its potential review in *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 25-253. Pet. 3 n.2. That request is now moot in light of this Court's remand of that case for further consideration following the decision in *Louisiana v. Callais*. But *Turtle Mountain* involved a claim under § 1983 and a different section of the VRA, so an abeyance would have been unwarranted in any event.

and Arkansans have continued to receive assistance voting from a person of their choice.

IV. THE DECISION BELOW WAS CORRECT AND DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT.

Finally, the Court should also deny the petition because the decision below was correct and consistent with this Court's precedent. United failed to show it has an equitable cause of action or that § 208 creates a private cause of action for would-be assisters.

A. The court below properly rejected United's belated attempt to assert an equitable cause of action.

As the Eighth Circuit correctly explained, *Armstrong* "alluded to the possibility that preemption principles may be a source for equitable relief when no other remedy is available." Pet. App. 12a (citing *Armstrong*, 575 U.S. at 326–28). *Armstrong* recognized that "federal courts may in *some* circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law." 575 U.S. at 326 (emphasis added). But *Armstrong* never held that equitable relief is always available, and it certainly did not hold a party can maintain a suit in equity in cases like this one where plaintiffs lack a cause of action, belatedly advanced an equitable argument, and concede that there is a statutory "enforcement mechanism." Pet. 22. Indeed, in *Armstrong* itself, the Court held an equitable remedy can be displaced by a statutory scheme. *See* 575 U.S. at 327 ("The power of federal courts of equity to enjoin unlawful executive action is subject to express and implied statutory limitations."). And it held that the statute at issue there

did foreclose equitable relief. *Id.* at 327–29. The same is true here. Pet. App. 10a–12a.

Even if the VRA's statutory enforcement scheme were less comprehensive than the Medicaid one at issue in *Armstrong*,[7] *Armstrong* does not set a threshold for what it takes for a statute to displace equitable relief. It instead emphasized that the "express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Id.* at 328 (quoting *Sandoval*, 532 U.S. at 290). And it *declined* to decide whether a statutory enforcement mechanism, "*by itself*," would "preclude the availability of equitable relief." 575 U.S. at 328 (citing *Va. Off. for Protection & Advocacy v. Stewart*, 563 U.S. 247, 256 n.3 (2011)). So even if the Eighth Circuit had "decided that equitable relief is *only* available when no other remedy is available," Pet. 21a (emphasis added),[8] that hypothetical decision would still not be contrary to this Court's precedent. Pet. App. 21 (citation omitted).

In any event, gone is the "era when the Court routinely inferred 'causes of action'" that are "'not explicit' in the text of the provision that was allegedly violated," *Hernandez v. Mesa*, 589 U.S. 93, 99 (2020) (quoting *Ziglar v. Abbasi*, 582 U.S. 120, 132 (2017)),

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[7] *But see Armstrong*, 575 U.S. at 328–29 (noting the "sole remedy" "is the withholding of Medicaid funds by the Secretary of Health and Human services"); *id.* at 347 (Sotomayor, J., dissenting) (explaining there was not a "carefully crafted . . . remedial scheme" (alteration in original)).

[8] The Eighth Circuit did not make such a categorical declaration. It instead simply decided that "equitable relief is not available for § 208" because of the "enforcement structure" of § 208. Pet. App. 12a.

and this Court has recently confirmed that its "equitable authority is not freewheeling," *Trump v. CASA, Inc.*, 606 U.S. 831, 841 (2025). "In both statutory and constitutional cases," the "watchword is caution" about judicial "authority to recognize any causes of action not expressly created by Congress." *Hernadez*, 589 U.S. at 101; *see* Andrew S. Oldham, et. al, The Ex Parte Young *Cause of Action: A Riddle, Wrapped in A Mystery, Inside an Enigma*, 120 Nw. U.L. Rev. 1697, 1729 (2026) ("[T]here are plenty of reasons to worry about recognizing a nonstatutory cause of action against state officials at equity."). The Eighth Circuit was thus right to not conclude that United lacked a cause of action here and could not obtain equitable relief.

B. The court below properly held § 208 does not create a private cause of action.

The Eighth Circuit was also right to conclude that "the text and structure" of § 208 show that it does "not create a private right of action." Pet. App. 6a. Correctly applying this Court's decision in *Sandoval*, the Eighth Circuit "interpret[ed]" § 208 "to determine whether it displays an intent to create not just a private right but also a private remedy" and concluded that it did not. Pet. App. 9a–12a. The Eighth Circuit initially noted that § 208 itself does not have a "private enforcement mechanism." *Id.* at 10a (quoting *Ark. State Conf.*, 86 F.4th at 1210). It then analyzed other VRA provisions, explaining that they too do not create a private cause of action to enforce § 208 but that they do authorize Attorney General enforcement. *Id.* at 10a–11a. And it ultimately declined to imply a private right of action, properly respecting Congress's

decision to not create a cause of action here and adhering to its judicial role. *Id.* at 12a.

United halfheartedly argues the Eighth Circuit's holding is wrong based on *Allen v. Milligan*, 599 U.S. 1, (2023), and *Allen v. State Board of Elections*, 393 U.S. 544 (1969), but neither case helps United or even addresses § 208. *State Board* was part of the "*ancien regime*" that this Court has rejected, *see Abbasi*, 582 U.S. at 131–32 (quoting *Sandoval*, 532 U.S. at 287), and *State Board* was decided long before § 208 was even enacted. *Allen* also does not involve § 208; it addresses § 2. 599 U.S. at 10. What's more, *Allen* "does not address whether § 2 contains a private right of action," because that issue "was not raised" before the Court. *Id.* at 90 (Thomas, J., dissenting). In short, United fails to show the decision below conflicts with this Court's precedent because it cannot.

CONCLUSION

For the foregoing reasons, the Court should deny the petition.

Respectfully submitted,

TIM GRIFFIN
Arkansas Attorney General

AUTUMN HAMIT PATTERSON
Solicitor General
Counsel of Record

NOAH P. WATSON
Deputy Solicitor General

OFFICE OF THE ARKANSAS
ATTORNEY GENERAL
101 West Capitol Ave
Little Rock, AR 72201
(501) 682-6302
autumn.patterson@arkansasag.gov

Counsel for Respondents

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