No. 22-2918

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARKANSAS UNITED, et al.,
Plaintiffs-Appellees,

v.

JOHN THURSTON, et al.,
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)

Emergency Motion to Stay Injunction for the 2022 General Election and for a Temporary Administrative Stay by September 16, 2022

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INTRODUCTION AND SUMMARY OF ARGUMENT

This emergency motion seeks a stay of the district court's late-breaking injunction of a commonsense measure against electioneering and the requirement that Defendants communicate its presumptive statewide effect to Arkansas's 75 county election boards by September 16—38 days before voting for this General Election. The district court waited nearly a year after briefing closed before issuing its injunction of Arkansas's prohibition on persons assisting more than six voters at the polls. During that time thousands of poll workers were trained on, and implemented, the six-voter limit in the Primary Elections.

The wheels of Arkansas's election machinery are in full rotation and have been for some time. Given the respective roles of state and county officials in Arkansas's cooperative administration of elections, it is impossible at this point for Defendants to communicate modifications to the voter-facing poll workers who enforce election procedures according to their training and established practices. And that is to say nothing of ensuring their compliance and uniform administration of a ruling that contradicts their prior training.

The district court's injunction will result in confusion, hardship, and uneven enforcement of the law by poll workers across Arkansas. Therefore, both the *Purcell* principle and traditional stay factors require staying the injunction for this General Election.

Due to the impending September 16, 2022, deadline for the State Board to notify county officials across Arkansas of the district court's decision and the confusion and chaos that notification will cause, the Court should expedite briefing in this matter and issue a temporary administrative stay of the order prior to September 16. Defendants request that the Court require any response to be filed no later than September 13, and any reply by September 14.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Sources

STATEMENT

This emergency motion arises from the district court's late-breaking injunction of a commonsense measure against electioneering and its requirement that Defendants communicate the ruling to Arkansas's 75 county election boards by September 16—a mere 38 days before voting for this General Election.

A. Ballot-Integrity Measures

Arkansas's election laws are designed to make voting easy and cheating hard. To ensure ballot secrecy and prevent unlawful electioneering, 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).

To avoid even the appearance of electioneering or undue influence, only 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 for voters who genuinely need assistance to vote. *Id.* 7-5-310(b).

To ensure this exceptional accommodation is not exploited for improper purposes, since 2009 Arkansas has provided 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). This six-voter limit is "a structural defense against abuse of the process." R. Doc. 134-5 at 24. Allowing individuals to assist voters without limit would "increase . . . greatly" the potential for fraud. R. Doc. 134-6 at 27.

B. Elections in Arkansas

Like other states, Arkansas's elections are cooperatively administered by state and county officials. The State Board plays its primary role well before each election cycle. To foster uniform application of the laws, it conducts biannual trainings before the Preferential Primary for each election cycle. Ark. Code Ann. 7-4-109(e). That training, conducted last May, expressed the importance of enforcing Arkansas's six-voter limit as an election safeguard. APP44, R. Doc. 170-1 at 1.

The 75 county boards must "exercise [their] duties consistent with the training and materials provided by the State Board." Ark. Code Ann. 7-4-107(a)(2). They must "[e]nsure compliance with all legal requirements relating to the conduct of elections." *Id.* 7-4-107(a)(1). This includes training the voter-facing poll workers and volunteers on matters including the six-voter limit, which those workers enforced during the 2022 Primary Elections. APP45, R. Doc. 170-1 at 2.

The State Board does not employ or supervise the county boards—who are selected by their county political parties, Ark. Code Ann. 7-4-102(a)(1)(A); APP45, R. Doc. 170-1 at 2—or the thousands of local poll workers, whom the county boards appoint and supervise. Ark. Code Ann. 7-4-107. Indeed, at this late stage of the election cycle, the State Board cannot ensure that any modification to election procedures is even *communicated* to the poll workers and volunteers responsible for the privacy and security of the polls, *id.* 7-5-310(a)(2)(C), (a)(3), let alone ensure compliance. APP45, R. Doc. 170 at 2.

C. Background Procedural History

Plaintiffs are an organization that advocates for immigrant populations and its director. Thirty-nine minutes before the 2020 General Election, Plaintiffs filed suit and a TRO/preliminary-injunction motion against two state entities (the State Board and the Secretary of State), and three Arkansas counties alleging that the six-voter limit 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* APP97, R. Doc. 35 at 3. The district court determined that Plaintiffs had a substantial likelihood of success on the merits, but denied Plaintiffs' motion, noting the six-voter limit's longstanding existence and the need to avoid "alter[ing] the procedures of an election that is already unfolding." APP104-05, R. Doc. 35 at 10-11.

Proceedings continued. One year ago—long before the current election cycle began—the parties filed cross-motions for summary judgment. R. Docs. 131, 134, 137. But, despite its previous determination that Plaintiffs would succeed on the merits, the motions remained pending for *almost a year* as the State Board conducted training, as deadlines for the 2022 Primary Elections[1] approached, came, and went, and as thousands of poll workers across Arkansas continued enforcing the six-voter limit at the polls.

D. District Court Decision

66 days before voting will begin, the district court enjoined Defendants from enforcing the law. APP39-40, R. Doc. 168 at 37-38. It dismissed Defendants' threshold arguments, including that Plaintiffs are not "aggrieved persons" under the VRA, are not *voters* who can claim Section 208 rights to a chosen assistant, and haven't named even a single person whose voting rights were impaired. APP18-27, APP31-33, 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

[1] *See* 2022 Election Dates, *Secretary of State John Thurston*, https://www.sos.arkansas.gov/uploads/elections/Important_Election_Dates.pdf.

terms of population percentages of "single language minorit[ies]" who are "limited-English proficient"). APP16-18, R. Doc 168 at 14-16.

The court compounded those errors by applying an incorrect legal standard. Continuing with a strict preemption analysis, *see, e.g.*, APP102, R. Doc. 35 at 8 (rejecting the "undue-burden standard" 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." Senate Rep. No. 97-417, 97th Cong., 2d Sess., at 63 (1982); *see* APP37-39, R. Doc. 168 at 35-37 (rejecting the Senate Report); *but see id.* at 33 (elsewhere relying on the Senate Report).

Defendants argued that Section 208 cannot contemplate unfettered voter discretion in choosing an assistor or else it would preempt even Arkansas's penal laws when an incarcerated person happens to be a voter's choice. In response, the court held that "[Section] 208 suggests that any assistor chosen by a voter must be *willing* and *able* to assist." APP38, R. Doc. 168 at 36. But that failed to recognize that those who disable themselves by assisting six voters are no longer "*able* to assist" due to the operation of Arkansas's election laws, just as an incarcerated person is not "*able* to assist" due to the operation of Arkansas's penal laws.

E. Clarification and Amended Order

The district court's order was also confusing. On one hand, it appeared *not* to enjoin the 72 nonparty counties from enforcing the six-voter limit in the General Election: Recognizing the election's proximity, the court "d[id] not expect Defendants to conduct updated trainings or produce an updated training manual before the 2022 General Election." APP40, R. Doc. 168 at 38 n.15. Rather, it said, "[f]or the 2022 General Election, Defendants must simply inform *their employees and volunteers* to not enforce the six-voter limit." *Id.* (emphasis added). But on the other hand, the order enjoined "all persons acting in concert with" Defendants from enforcing the law. APP40, R. Doc. 168 at 38. The court's order left unclear whether the nonparty county boards and their poll workers were considered to be acting "in concert with" Defendants and whether or how they would be affected by the order.

So Defendants moved for clarification. Despite having said Defendants were *not* expected to take action concerning the nonparty counties for the General Election, the court reproached Defendants for not informing those county boards of its ruling, APP48, R. Doc. 178 at 2 (Defendants, having "previously trained the nonparty county election boards," have now "declined to inform them of the Court's ruling."); *see* APP49, R. Doc. 178 at 3 ("The State Defendants could have

ensured clarity by informing the nonparty county election boards of the Court's declaration.").

The district court then amended its order. Instead of relieving Defendants from conducting *any* trainings before the 2022 General Election as its original order had done, the amended order—47 days prior to the start of voting—relieved Defendants only from conducting "*formal* trainings," APP90, R. Doc. 179 at 39 n.16 (emphasis added), and further required the State Board to communicate the injunction and other rulings to all county boards by September 16—a mere 38 days before voting begins. APP89, R. Doc. 179 at 38 & n.16.

But such a memorandum to the county boards cannot "ensure[] clarity" because once poll workers and volunteers have been trained for the Primaries, most do not attend supplemental training before the General Election. APP45, Doc. 170 at 2. Having already conducted its statutorily-prescribed biannual training, at this late stage the State Board cannot compel attendance at additional trainings; any other training would necessarily be at individual counties' own initiative and expense—which they may lack the resources to incur. *Id.* The court failed to appreciate the impossibility, at this point in the election cycle, of Defendants communicating with the thousands of voter-facing poll workers and volunteers who will enforce election procedures according to their training and established

practices—to say nothing of Defendants' inability to ensure their compliance with any injunction. APP45, Doc. 170 at 2.

Given the proximity of the district court's September 16 deadline and the approaching election, Defendants sought an emergency stay of the injunction for the General Election, which the court quickly denied in a text-only order. APP93, R. Doc. 184. Despite previously acknowledging at least two other district-court decisions that parted ways with its analysis, *see* APP101, R. Doc. 35 at 7 (citing *Ray v. Texas*, 2008 WL 3457021, at *2 (E.D. Tex. Aug. 7, 2008)), and *Priorities USA v. Nessel*, 2020 WL 5742432, at *12-14 (E.D. Mich. Sept. 17, 2020)), the court said that "the underlying merits are entirely clearcut" in Plaintiffs' favor. APP93, R. Doc. 184 (citing *Merrill v. Milligan*, 142 S. Ct. 879, 881 (2022) (Kavanaugh, J., concurring)).

Finally, the district court stated that "no reasonable confusion could result" from its order, APP93, R. Doc. 184, ignoring the confusion and turmoil created by the election's proximity and the State Board's "full[] expect[ation]" of "uneven and inconsistent enforcement" of the laws directly resulting from the law's being enjoined for the 2022 General Election. APP46, R. Doc. 170-1 at 3.

Defendants now ask this Court to grant the limited relief of staying the district court's injunction for this General Election and of entering a temporary

administrative stay before the district court's September 16 deadline, pending consideration of this motion.

ARGUMENT

Under the "'traditional' standard for a stay," courts "consider[] four factors: '(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.'" *Nken v. Holder*, 556 U.S. 418, 425-26 (2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). The balance-of-harms and public-interest factors merge when the government is the defendant. *Nken*, 556 U.S. at 435.

But under the "*Purcell* principle," *see Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), the "traditional test for a stay" does not apply "in election cases when a lower court has issued an injunction of a state's election law in the period close to an election." *Merrill*, 142 S. Ct. at 880 (Kavanaugh, J., concurring). Rather, courts considering whether to stay an injunction pending appeal are required to weigh "considerations specific to election cases." *Purcell*, 549 U.S. at 4-5. Most important is the state's "extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures." *Id.* at 881. "[T]he *Purcell* principle" has thus become "a bedrock tenet of election law: When an election is close at hand, the rules of the road must be clear and settled," *Merrill*, 142 S. Ct. at 880-81 (Kavanaugh, J., concurring), and courts

routinely stay injunctions while "express[ing] no opinion" on the merits. *Purcell*, 549 U.S. at 5.

Even under what has been described a "relaxed version" of the *Purcell* principle, to avoid a stay of an injunction a plaintiff must establish the following: "(i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring).

On either test, a stay of the injunction for this General Election is warranted.

I. *Purcell* requires staying the injunction for this General Election.

The Supreme Court has explained that "lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (citing *Purcell*, 549 U.S. 1; *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 574 U.S. 951 (2014)). Yet that is what the district court has done. No matter what standard applies, this Court should stay the injunction for this General Election.

A. The injunction was issued "on the eve of" this General Election.

The Supreme Court has not delineated exactly how close to an election is too close to enjoin election rules. In *Purcell*, the Court stayed an injunction that, like

here, was issued "just weeks before the election." 549 U.S. at 4; *see North Carolina v. League of Women Voters*, 574 U.S. 927 (2014) (staying injunction issued 33 days before election); *Husted v. Ohio State Conf. of N.A.A.C.P.*, 573 U.S. 988 (2014) (staying injunction issued 60 days before election).

More recently, the Court has stayed injunctions when elections were months away. In *Merrill,* it stayed an injunction with the primary election "about four months away." 142 S. Ct. at 888 (Kagan, J., dissenting). In *Robinson v. Ardoin*, the Fifth Circuit distinguished *Merrill* because the injunctions were issued five months prior to the election. 37 F.4th 208, 229 (5th Cir. 2022). But the Supreme Court disagreed and stayed them, expressing no view on the merits. *Ardoin v. Robinson*, 142 S. Ct. 2892 (2022). Lower courts have followed suit and held that *Purcell*'s window begins months prior to an election. *See League of Women Voters v. Fla. Sec'y of State*, 32 F.4th 1363, 1371 (11th Cir. 2022) (holding that "[w]hatever *Purcell*'s outer bounds," it included where "voting in the next statewide election was set to begin in *less* than four months"); *Thompson v. DeWine*, 959 F.3d 804, 813 (6th Cir. 2020) (per curiam) (a stay was warranted despite election being "months away"), *motion to vacate stay denied*, No. 19A1054, --- S. Ct. --- (June 25, 2020).

Here, the injunction falls well within *Purcell*'s window. Voting begins October 24.[2] The district court first enjoined Defendants from enforcing the law just 66 days before then. APP3, R. Doc. 168. That injunction was already too close. *See Ardoin*, 142 S. Ct. 2892 (five months); *Merrill*, 142 S. Ct. 879 (about four months); *Husted*, 573 U.S. 988 (sixty days). But, nineteen days closer the court went further and imposed even more obligations on Defendants and the 72 nonparty counties. APP47, R. Doc. 178.

Regardless of when counting begins, we are "on the eve" of this General Election, and *Purcell*, rather than the traditional stay analysis, applies.

B. Plaintiffs cannot show that the order will not cause significant confusion or hardship.

This Court may stay the injunction while "express[ing] no opinion" on the merits. *Purcell*, 549. U.S. at 5. If the Court instead considers the "relaxed" version of *Purcell* described by Justice Kavanaugh in *Merrill*, it is Plaintiffs' burden to show that the "changes" imposed "are at least feasible before the election without significant cost, confusion, or hardship." *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring). That is because "[l]ate judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." *Id.* at 880-81.

[2] https://www.sos.arkansas.gov/uploads/elections/Important_Election_Dates.pdf.

Here, the district court's first order expressly recognized its proximity to this General Election and the risk of running afoul of *Purcell*. APP40, R. Doc. 168 at 38 n.15. Accordingly, the court stated it "does not expect Defendants to conduct updated trainings or produce an updated training manual before the 2022 General Election." *Id.* Rather, as relevant here, "Defendants must simply inform their employees and volunteers to not enforce the six-voter limit." *Id.*

The order did not enjoin the 72 nonparty counties or address their obligations concerning enforcement of the six-voter limit. Given the counties' duty under the law to enforce the six-voter limit consistent with the State Board's training for this election cycle, Ark. Code Ann. 7-4-107(a)(2), Defendants sought clarification, after which the court indicated that any enforcement of the six-voter limit by nonparty poll workers across Arkansas might constitute "act[s] in concert with the State Defendants," thus rendering them in violation of the court's injunction. APP48, R. Doc. 178 at 2.

As explained above, Defendants do not employ or supervise either the county boards, who are selected by their county political parties, Ark. Code Ann. 7-4-102(a)(1)(A); APP45, R. Doc. 170-1 at 2, or the local poll workers, who are appointed and supervised by the county boards. Ark. Code Ann. 7-4-107.

After receiving the State Board's training for this election cycle, each county's poll-worker trainers have already trained thousands of poll workers

serving in the local precincts. APP44, R. Doc. 170-1. Those poll workers have already enforced the six-voter limit throughout this election cycle, including the Primary Elections. *Id.* Indeed, at this late stage of the election cycle, Defendants cannot ensure that any modification to election procedures are even *communicated* to the poll workers and volunteers who are responsible for the privacy and security of the polls, Ark. Code Ann. 7-5-310(a)(2)(C), (a)(3), let alone ensure compliance. APP45, R. Doc. 170 at 2.

Nevertheless, the district court amended its order, requiring the State Board to communicate the injunction and other rulings to all county boards by September 16—a mere 38 days before voting for the 2022 General Election. APP89, Doc. 179 at 38 n.16. Further, in a change, the amended order disclaimed only the expectation that the State Board would conduct "updated *formal* trainings" before the 2022 General Election. *Id.* (emphasis added). The district court thus tacitly recognized that some additional training would be necessary to effectuate its order. *Contrast* APP40, R. Doc. 168 at 38 n. 15 (original order disclaiming expectation merely of "updated trainings"). Such training would be unprecedented, infeasible, and, in any case, ineffective, given the State Board's inability to compel attendance.

Issuing a memorandum about the district court's rulings—as the district court has ordered—without providing additional training is itself a recipe for

electoral disaster. That would contradict the State Board's training on the importance of enforcing the six-voter limit. APP44, R. Doc. 170-1. It is unclear how each of the 75 county boards would interpret such a memorandum. And it is highly unlikely they would, or even could, uniformly implement changes consistent with the order at each local precinct for this General Election. *Id.*

The court's clarification order suggested that a memorandum about its rulings would be similar to other memoranda the State Board has issued, implying that the obligation it has imposed will not be problematic. APP49, R. Doc. 178 at 3. Not so. Those other memoranda, R. Docs. 176-1, 176-2, did not contradict the training or materials that the State Board had provided to county election officials for a then-current election cycle. Rather, they advised county election officials on new legislation passed by the Arkansas General Assembly that was to become effective for an *upcoming* election cycle. *Id.*

The injunction will certainly create confusion, hardship, and "uneven and inconsistent enforcement of the six-voter limit and related laws by poll workers at the polling sites across the state." APP46, R. Doc. 170-1 at 3. There is no way to ensure, on the eve of this General Election, that counties across the state will be able to successfully communicate to their poll workers that they are to ignore the trainings they received and implemented earlier this year and enforce the law differently.

The district court stated that there is "no cause for concern that election officials or voters will be confused by the Court's enjoinment of the six-voter limit" because (it asserted) "the six-voter limit is not a voter-facing policy." APP89, R. Doc. 179 at 39 n.16. But that is simply incorrect. The voter-facing poll workers and volunteers are trained to enforce the six-voter limit, and they have already done so during the Primary Elections. APP45, R. Doc. 170-1 at 2. To enforce Arkansas's law, poll workers inform those voters who have requested assistance by a person who has reached the six-voter limit that someone else must assist them instead. That is what they have been trained to do. Upending that training in this General Election will create confusion and hardship for both poll workers and voters.

Whatever the district court's estimation of the confusion its injunction will cause, "[e]ven seemingly innocuous late-in-the-day judicial alterations to state election laws can interfere with administration of an election and cause unanticipated consequences." *Democratic Nat'l Comm. v. Wis. State Legislature*, 141 S. Ct. 28, 31 (2020) (Kavanaugh, J., concurring).

It is no exaggeration to say that the wheels of Arkansas's election machinery are in full rotation and have been for some time. The injunction of the six-voter limit at this point in the current election cycle—only weeks before voting for this General Election—will certainly result in confusion, hardship, and uneven

enforcement of the laws by poll workers across Arkansas. *Id*. That is precisely what the *Purcell* principle seeks to avoid.

C. The merits are not "entirely clearcut" in Plaintiffs' favor.

As explained above, the Court can and should stay the injunction for this General Election with no need to "express [an] opinion" on the merits. *Purcell*, 549 U.S. at 5. If the Court instead considers the merits under the "relaxed" version of *Purcell* put forth by Justice Kavanaugh in *Merrill*, the State Defendants need only show that the merits of the case are not "entirely clearcut in favor of" Plaintiffs. *Merrill*, 142 S. Ct. at 881; *see also League of Women Voters of Fla.*, 32 F. 4th at 1372 (explaining that where plaintiffs "have already obtained injunctive relief upsetting the previously applicable state election procedures, . . . [t]he state need not show . . . that its position is entirely clearcut. Rather, it need only show that plaintiffs' position is *not*." (quotations omitted)).

As explained below, Defendants are likely to succeed on the merits. But the Court need not agree with that in order to stay the injunction for this General Election. Rather, it need only acknowledge that the merits of this case are not entirely clearcut. Indeed, the district court has already acknowledged at least two other district-court decisions that part from its preemption analysis. APP101, R. Doc. 35 at 7 (citing *Ray*, 2008 WL 3457021, at *2, and *Nessel*, 2020 WL 5742432, at *12-14). This Court need only recognize the possibility of a different

conclusion carrying the day on appeal to justify staying the injunction under the "relaxed" *Purcell* framework.

II. Far from being "entirely clearcut in favor of" Plaintiffs, Defendants are likely to succeed on the merits.

As explained above, the *Purcell* framework is the proper analysis in deciding whether to stay a late-breaking injunction such as this one. But even if the Court were to apply the traditional factors, Defendants are entitled to a stay.

A. Plaintiffs are not "aggrieved persons" under the VRA.

Section 208 protects the rights of *voters*—not *nonvoter assistors*. *See* 52 U.S.C. 10508. Standing to sue under the VRA is limited to the Attorney General and to (at most) "aggrieved person[s]," 52 U.S.C. 10302(a),[3] a category that the Eighth Circuit has held is "limited to persons whose *voting rights* have been denied or impaired." *Roberts v. Wamser*, 883 F.2d 617, 624 (8th Cir. 1989) (emphasis added); *see* 52 U.S.C. 10302(c); *id.* 10308(d). A plaintiff must have suffered impairment of his or her *voting rights* to have standing to sue under the VRA. It is not sufficient to assert the purported right of a nonvoter assistor.

Here, Arkansas United and Mireya Reith are *not* persons whose voting rights have been impaired (nor have they named anyone meeting that description). *See*

[3] *But see Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, Case No. 4:21-cv-01239-LPR, --- F. Supp. 3d ---, 2022 WL 496908 (E.D. Ark. Feb. 17, 2002) (holding only the Attorney General can sue to enforce the VRA), *appeal filed*, No. 22-1395.

Kowalski v. Tesmer, 543 U.S. 125, 130 (2004) (cannot rely on relationship to unascertained third parties). They are, rather, an advocacy organization and its director who want to serve as nonvoter assistors to an unlimited number of people. But that is insufficient to qualify as an "aggrieved person" under the VRA. *Roberts*, 883 F.2d at 624; *cf. Magdy v. I.C. Sys., Inc.*, No. 21-3010, --- F.4th ---, 2022 WL 4075764, at *1-4 (8th Cir. Sept. 6, 2022) (non-consumers lack standing under FDCPA).

Further, the VRA's detailed enforcement mechanisms contain no indication that Congress authorized anyone else (other than "the Attorney General or an aggrieved person," 52 U.S.C. 10302(c)), to bring a state-officer suit under *Ex parte Young*, 209 U.S. 123 (1908). 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 Fla. v. Florida*, 517 U.S. 44, 74 (1996).

Ensuring that Arkansas United can provide assistance to an unlimited number of people is *not* the same thing as ensuring that voters are able to choose a trusted assistant. Therefore, Plaintiffs lack both standing and a private right of action to bring a Section 208 claim.

B. Using the correct legal standard, the six-voter limit does not unduly burden voters' Section 208 rights.

States enjoy "broad power" to operate elections. *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 451 (2008). "[T]he 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, 1677 (2019) (quotation omitted). "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.'" *Nessel*, 487 F. Supp. 3d at 619 (quoting S. Rep. No. 97-417, at 63) (emphasis added). Congress further "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, at 63.

The six-voter limit "is designed to be a structural defense against abuse of the process." R. Doc. 134-5 at 24. It protects the rights of voters by precluding any one person from being in a position to exercise an outsized (and potentially malign) influence on the votes of voters who are the most vulnerable (i.e., those who require assistance).

The law furthers Arkansas's important interests in combating fraud, ensuring that votes are cast without undue influence, and easing burdens on poll workers.

Arkansas "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) (quotation omitted). Voters who require the assistance of another person to vote are especially vulnerable to improper influence due to their relationship of dependence. Allowing a person to assist more than six voters would "increase . . . greatly" the potential for fraud among these voters. R. Doc. 134-6 at 27. But the six-voter limit does more than merely prevent fraud. It also combats undue influence that falls short of outright fraud. Therefore, the law more broadly furthers Arkansas's "important" interest in "[e]nsuring that every vote is cast freely, without intimidation or undue influence." *Brnovich*, 141 S. Ct. at 2340.

Finally, the six-voter limit serves the State's "undoubtedly important" interest in easing burdens on poll workers. *Ohio Democratic Party v. Husted*, 834 F.3d 620, 635 (6th Cir. 2016). Conducting an election is an enormous undertaking that requires poll workers to strictly maintain the polling place and manage voters while studiously following a massive set of federal laws, state laws, and other election procedures. *See generally* R. Doc. 134-7 at 36-39, 43-58. Recognizing the heavy responsibilities placed on the shoulders of poll workers, the six-voter limit is easy to enforce: a person may assist six voters, no more. This "structural defense" prevents poll workers from having to judge the motives of those providing assistance. R. Doc. 134-5 at 24.

Arkansas's six-voter limit is well within the latitude retained by the States to regulate nonvoter assistors at the polls. It does not unduly burden voters' Section 208 rights.

CONCLUSION

Defendants ask this Court to grant the limited relief of staying the district court's injunction for this General Election and of entering a temporary administrative stay before the district court's September 16 deadline, pending consideration of this motion.

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Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 5,197 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 font, using Microsoft Word.

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

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CERTIFICATE OF SERVICE

I certify that on September 12, 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.

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