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 - Fayetteville
No. 5:20-CV-05193 (Honorable Timothy L. Brooks)

APPELLEES' PETITION FOR REHEARING EN BANC

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INTRODUCTION AND FRAP 40(b)(2) STATEMENT

Petitioners seek rehearing en banc to reinstate private parties' ability to bring suit to enforce the guarantees of Section 208. Congress enacted Section 208 of the federal Voting Rights Act (VRA) to ensure that voters who need assistance to vote are able to vote with the assister of their choice. In Arkansas, voters who need this assistance may be denied it because Arkansas's arbitrary six-voter limit imposes criminal penalties on individuals that provide that assistance.

The district court reviewed this case under well-established preemption doctrine and rendered judgment on Plaintiffs' Supremacy Clause claim, which Appellants did not challenge on appeal in its opening brief. Regardless of whether Plaintiffs would otherwise have a private right of action to enforce Section 208,[1] the Supreme Court has recognized that federal courts have a long-established practice of enjoining preempted state action. Under *Ex parte Young*, Plaintiffs—as private parties subject to criminal penalties under state law—can maintain a suit in equity for injunctive relief against state officers. 209 U.S. 123 (1908).

The district court held consistent with this longstanding Supreme Court precedent that suits under *Ex parte Young* are an appropriate method to enforce the

[1] The panel relied on *Arkansas State Conference NAACP v. Arkansas Board of Apportionment* (*Arkansas NAACP*), 86 F.4th 1204 (8th Cir. 2023), Eighth Circuit precedent, and held that Section 208 does not create a private right of action. The panel further concluded that the Supremacy clause also does not create a private right of action.

VRA. Without addressing the district court's holding under *Ex parte Young*, the panel erroneously concluded that equitable relief is not available for Section 208 under the Supremacy Clause. This Court has previously recognized that "if the district court states multiple alternative grounds for its ruling and the appellant does not challenge all those grounds in the opening brief, then [the Court] may affirm the ruling." *Ziegler v. 3M Co.*, No. 23-3031, 2024 WL 2733222, at *1 (8th Cir. May 28, 2024) (quoting *Rivero v. Bd. of Regents of Univ. of N.M.*, 950 F.3d 754, 763 (10th Cir. 2020)).

The panel's failure to address *Ex Parte Young,* which the district court relied on, creates conflict with Supreme Court precedent and warrants rehearing en banc.

STATEMENT OF THE CASE

I. Statutory Background

In the hearings on the Voting Rights Act amendments of 1982, members of Congress expressed concerns about the continuing problems facing disabled and low-literate voters at the polls, particularly with poll workers who threatened and coerced these voters. S. Rep. No. 97-417, at 62 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 240-41. ("members of such groups run the risk that they will be discriminated against at the polls and that their right to vote in state and federal elections will not be protected"). Congress acted specifically to address these concerns and by enacting Section 208, which 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.

Congress also designed Section 208 to work in tandem with Section 203 of the VRA, which mandates bilingual ballots and other language assistance in jurisdictions that meet a minimum threshold of limited English proficient voters. 52 U.S.C. § 10503. Where jurisdictions are not covered by Section 203, like Arkansas, Section 208 guarantees that limited English proficient voters have the right to bring an assister to help them. *Id.*

Courts have routinely allowed both the federal government and private plaintiffs to bring suits to enforce the guarantees of Section 208. *See OCA-Greater Houston v. Tex.*, 867 F.3d 604, 615 (5th Cir. 2017) (invalidating a Texas law that limited categories of voter assisters); *League of Women Voters of Ohio v. LaRose*, 741 F. Supp. 3d 694, 710 (N.D. Ohio 2024) (holding that "Intervenors provide[d] no persuasive arguments for this Court to depart from th[e] consensus" that "Section 208 permits private causes of action"); *Fla. State Conf. of NAACP v. Lee*, 576 F.Supp.3d 974, 988–90 (N.D. Fla. 2021) (holding that "far from suggesting that Congress intended to preclude private parties from enforcing section 208, section 3 evinces Congress's intent to authorize such suits").

II. Procedural Background

Plaintiffs filed suit on November 2, 2020 and alleged that §§ 7-5-310(b)(4)(B), 7-5-310(b)(5), 7-1-103(a)(19) and 7-1-103(b)(1) of the Arkansas Election Code violated Section 208 of the VRA by prohibiting voters from choosing an assister who had already helped six other voters during an election—a restriction not contained in the Voting Rights Act. *See* APP495, 500, 526 R. Doc. 179 at 6, 32 Defendants included the members of the Arkansas State Board of Election Commissioners, which includes the Secretary of State ("the State Election Board"), and the election officials of Washington, Benton and Sebastian counties ("the three counties"). On November 3, 2020, the district court denied Plaintiffs' motion for a preliminary injunction. APP506 R. Doc. 179 at 12.

Sebastian County, Benton County, and the State Election Board all moved to dismiss. *See* APP506-507 R. Doc. 179 at 12-13. The district court denied all three motions. App. 050-051, R. Doc. 102 at 1-2. In rejecting the State Election Board's argument that Plaintiffs suit was barred by sovereign immunity, the district court held that Plaintiffs appropriately brought their action under *Ex parte Young*. APP067 R. Doc. 102 at 18. ("suits pursuant to *Ex parte Young* are an appropriate method of enforcing the VRA"). The district court concluded that "to the extent the VRA includes other methods of enforcement, it does not supplant officer suits under *Ex parte Young*." *Id.*

On August 19, 2022, following cross motions for summary judgment, the district court held again that "the methods of enforcement contained in the VRA do not supplant officer suits under *Ex parte Young*." APP524, R. Doc. 179 at 30. The district court stated, "The Court has already explained at length, in its Memorandum Opinion and Order denying Defendants' motions to dismiss, why Plaintiffs may sue under *Ex Parte Young." Id.*

The district court ruled on the merits that the six-voter limit and related criminal provisions are preempted under the Supremacy Clause. APP532, R. Doc. 179 at 38 and APP534, R. Doc. 180 at 1. Comparing the federal and state statutes at issue, the district court observed that "Under § 208, a voter may select '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.' But, in Arkansas, if the person of a voter's choice had already assisted six voters, the voter could not be assisted by that person, and the voter would not be getting the assister of their choice." APP526, R. Doc. 179 at 32. Because the six-voter limit prohibits the assistance to which voters are entitled under Section 208, the district court concluded "'compliance with both . . . impossible'" and the six-voter limit is preempted. *Id.* (quoting *Pet Quarters, Inc. v. Depository Tr. & Clearing Corp.*, 559 F.3d 772, 780 (8th Cir. 2009). The district court also concluded that the six-voter limit "poses an obstacle to Congress's clear purpose to allow the voter to decide who assists them at the polls" by adding

categories of prohibited assisters beyond those enumerated by Congress in the statute. *Id.* at 33 (noting that Section 208 prohibits assisters who are the voter's employer or agent of that employer or officer or agent of the voter's union). The district court reasoned, based on the same preemption analysis, that the VRA does not preempt the assister-tracking requirement of the Arkansas Code. *Id.*

The district court ordered Defendants to cease enforcement of the six-voter limit and cease enforcement of the related criminal provisions at §§ 7-1-103(a)(19)(C) and 7-1-103(b)(1) "to the extent they are used to enforce criminal penalties for violations of § 7-5-310(b)(4)(B)." APP532, R. Doc. 179 at 38 and APP534, R. Doc. 1801 at 1. The State Election Board appealed. *See* APP536, R. Doc. 181. This Court granted the State Election Board's motion to stay the district court's judgment pending appeal. *Arkansas United v. Thurston*, No. 22-2918 (8th Cir. Sept. 28, 2022) (order granting stay pending appeal).

On July 28, 2025, the panel reversed the district court's judgment faithfully following Eighth Circuit precedent.[2] *Arkansas United v. Thurston,* No. 22-2918, 2025 WL 2103706, at *4 (8th Cir July 28, 2025). Following *Arkansas State*

[2] The panel did not reach the merits of the district court's award of fees and costs. The panel decision to vacate the award is based solely on the panel reversing the district courts grant for summary judgment for Arkansas United and denial of summary judgment for the State Election Board. *Arkansas United v. Thurston,* No. 22-2918, 2025 WL 2103706, at *4 (8th Cir July 28, 2025). For the reasons discussed in Appellees' petition, the panel erroneously reversed the district court's judgment, thus the panel also erred in vacating the award for fees and costs.

Conference NAACP v. Arkansas Board of Apportionment (*Arkansas NAACP*), 86 F.4th 1204 (8th Cir. 2023), reh'g denied, 91 F.4th 967 (8th Cir. 2024), where the Court held that Section 2 of the VRA does not provide a private right of action, the panel held that Section 208 does not create a private right of action. *Id.* at 1217-18.[3] The panel further held "no private right of action is created by the Supremacy Clause." *Arkansas United v. Thurston,* No. 22-2918, 2025 WL 2103706, at *3 (8th Cir July 28, 2025). In finding no cause of action, the panel did not address the district court's *Ex parte Young* holding. *Id.* The panel did not reach the merits of the case. *See id.*

ARGUMENT

I. Rehearing should be granted to reinstate private parties' ability to bring suit under Section 208

a. The panel decision departs from Supreme Court precedent

The district court reviewed this case under well-established preemption doctrine and rendered judgment on Plaintiffs' Supremacy Clause claim. This Court

[3] On July 24, 2025, the U.S. Supreme Court granted an order to stay this Court's decision in *Turtle Mountain Band of Chippewa Indians v. Howe* (*Turtle Mountain*), 137 F. 4th 710 (8th Cir. 2025), pending the filing and disposition of a petition for a writ certiorari, should either party seek one. *Turtle Mountain Band of Chippewa Indians v.* Howe, No. 25A62, 2025 WL 2078664 (U.S. July 24, 2025). Given that the Supreme Court may review the issues in the case, including whether private plaintiffs may sue to enforce Section 2 of the federal Voting Rights Act, Appellees recommend the Court stay any decision in this case on private parties' ability to enforce the guarantees of Section 208 pending that decision. A Supreme Court decision in *Turtle Mountain* is likely to affect this case.

must follow Supreme Court precedent on Plaintiffs' ability to sue under the Supremacy Clause.

Ex parte Young provides private plaintiffs subject to criminal penalties under state law—as Plaintiffs are in this case—the ability to maintain a suit in equity for injunctive relief against state officers who are violating federal law.[4] *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 326-327 (2015). The district court held consistent with Supreme Court precedent in rejecting Defendant's sovereign immunity argument that Plaintiffs can sue under *Ex parte Young*. *See Arkansas United v. Thurston*, 517 F. Supp. 3d 777, 786 (W.D. Ark. 2021). The panel did not address this holding.

Without conducting the analysis required under *Ex parte Young*, the panel concluded that "equitable relief is not available for [Section] 208 under [preemption] principles" because "Section 208 has its own enforcement structure." *Arkansas United v. Thurston*, No. 22-2918, 2025 WL 2103706, at *3 (8th Cir. July 28, 2025). But as the district court properly held, "the methods of enforcement contained in the Voting Rights Act [do] not supplant officer suits under *Ex parte Young*." *Arkansas United v. Thurston*, 517 F. Supp. 3d 777, 790 (W.D. Ark. 2021).

[4] Appellees did not raise the district court's *Ex parte Young* holding in its response brief. The parties, however, discussed *Ex Parte Young* during oral argument before the panel. Additionally, *Ex parte Young* was raised in the brief for the United States as Amicus Curiae in Support of Appellees filed on August 30, 2024.

Congress has not explicitly or implicitly foreclosed such actions seeking equitable relief. Instead, Congress has reiterated time and again its intent that the VRA be privately enforceable. Accordingly, this suit is properly brought consistent with *Ex parte Young*.

The VRA text and structure clarify that Congress intended private enforcement of the VRA's provisions, including Section 208. Congress amended Section 3 to provide enforcement authority to "aggrieved person[s]." 52 U.S.C.A. § 10302. "The VRA, as amended, clearly expresses an intent to allow private parties to sue the States." *Alabama State Conference of Nat'l Ass'n for the Advancement of Colored People v. Alabama*, 949 F.3d 647, 652 (11th Cir. 2020). The Supreme Court and federal courts have routinely allowed private plaintiffs to bring suits to enforce the VRA. *See Allen v. Milligan*, 599 U.S. 1 (2023) (affirming preliminary injunction for plaintiffs and assuming but not deciding that plaintiffs have a private right of action to sue under § 2 of the VRA); *OCA-Greater Houston v. Tex.*, 867 F.3d 604, 615 (5th Cir. 2017) (invalidating a Texas law that limited categories of voter assisters); *Fla. State Conf. of NAACP v. Lee*, 576 F.Supp.3d 974, 988–90 (N.D. Fla. 2021) (holding that "far from suggesting that Congress intended to preclude private parties from enforcing section 208, section 3 evinces Congress's intent to authorize such suits"). Additionally, Congress has had over half a century to amend the VRA to prevent it from preempting state laws, but Congress has chosen not to do so.

While the panel is correct that the Supreme Court has explained that the Supremacy Clause "creates a rule of decision" and not a cause of action, *Armstrong,* 575 U.S at 324–25, the Supreme Court has also explained that "federal courts may in some circumstances grant injunctive relief against state officers who are violating … federal law." *Id.* at 326. Moreover, the Supreme Court held that the ability to sue to enjoin unconstitutional actions by state officers does not rest upon a right of action contained in the Supremacy Clause, but rather an equitable "judge-made" remedy. *Id.* at 327. The Supreme Court thus recognized that federal courts have a long-established practice of enjoining preempted state action.

The panel's failure to address *Ex parte Young*, Supreme Court precedent on which the district court relied, warrants rehearing en banc.

b. The panel decision also departs from this Court's precedent on the issue of waiver

The panel decision departed from this Court's precedent when it completely set aside the issue of waiver. This Court's precedent is clear that "[a]rguments not raised before the district court are waived on appeal." *Cromeans v. Morgan Keegan & Co.*, 859 F.3d 558, 568 n.5 (8th Cir. 2017). Furthermore, "[c]laims not raised in an opening brief are deemed waived." *Jenkins v. Winter*, 540 F.3d 742, 751 (8th Cir. 2008) (citing *Fair v. Norris*, 480 F.3d 865, 869 (8th Cir. 2007) and *Express Scripts, Inc. v. Aegon Direct Mktg. Servs., Inc.*, 516 F.3d 695, 702 (8th Cir. 2008)). The State

did not make, and therefore waived, any argument that the district court erred in reaching Plaintiffs' constitutional claim under the Supremacy Clause. The State similarly waived any argument on the district court's holding on *Ex parte Young*. The panel's lack of consideration on this issue warrants rehearing en banc.

c. Private parties' ability to bring suit under Section 208 is an issue of exceptional importance

The panel decision critically undermines private enforcement of the guarantees of Section 208. The U.S. Supreme Court has reiterated that the federal Voting Rights Act is considered by many to be "the most successful civil rights statute in the history of the Nation." *Allen v. Milligan*, 599 U.S. 1, 10 (2023) (quoting S. Rep. No. 97–417, at 111 (1982)). Congress enacted Section 208 of the VRA to address concerns about the continuing problems facing disabled and low-literate voters at the polls, particularly with poll workers who threatened and coerced these voters. *See* S. Rep. No. 97-417, at 62 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 240-41. If the panel decision is left undisturbed, Congress's intent to allow voters to choose their own assister to protect the ability to vote without interference or coercion by poll workers is at risk. The guarantees of Section 208 are in danger of being rendered meaningless without an enforcement mechanism by private parties.

CONCLUSION

For the foregoing reasons, Appellees respectfully request the Court grant the petition and rehear the case en banc.

Dated: August 25, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 25, 2025, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system, which shall send notification of such filing to any CM/ECF participants.

/s/ Susana Sandoval Vargas
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 40(d)(3)(A) because it contains 3082 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Times New Roman font) using Microsoft Word (the same program used to calculate the word count).

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/s/ Susana Sandoval Vargas
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