No. 25-

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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Whether private plaintiffs may maintain a suit in equity for declaratory and injunctive relief against state actors to prevent the continued enforcement of a state law preempted by Section 208 of the Voting Rights Act, 52 U.S.C. § 10508.

2. Whether Section 208 of the Voting Rights Act, 52 U.S.C. § 10508, is enforceable by private plaintiffs.

PARTIES TO THE PROCEEDING[1]

The Petitioners in this Court are Arkansas United and L. Mireya Reith.

The Respondents in this Court are 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.

1. The United States is not a party to this case. There is a scrivener's error on the Eighth Circuit's judgment. *See* App. 19a ("grant of summary judgment for United States and denial of summary judgment for the State is reversed"). The court meant "United" not the "United States." *See* App. 13a ("we reverse the grant of summary judgment for United and denial of summary judgment for the State").

CORPORATE DISCLOSURE STATEMENT

Petitioner Arkansas United has no parent corporation or publicly held company that owns 10% or more of its stock.

RELATED PROCEEDINGS

This case arises from the following proceedings:

Arkansas United v. Thurston, Case No. 5:20-CV-5193, 517 F. Supp. 3d 777 (W.D. Ark. 2021) (denying motion to dismiss).

Arkansas United v. Thurston, Case No. 5:20-CV-5193, 2022 WL 3584626 (W.D. Ark. Aug. 19, 2022) (granting in part and denying in part motion for summary judgment).

Arkansas United v. Thurston, Case No. 5:20-CV-5193, 2023 WL 187507 (W.D. Ark. Jan. 13, 2023), vacated and remanded, 146 F.4th 673 (8th Cir. 2025).

Arkansas United v. Thurston, Case No. 5:20-CV-5193, 626 F. Supp. 3d 1064 (W.D. Ark. 2022), rev'd and vacated, 146 F.4th 673 (8th Cir. 2025) (amended order granting summary judgment).

Arkansas United v. Thurston, Case Nos. 22-2918, No. 23-1154, 146 F.4th 673 (8th Cir. 2025) (reversing order granting summary judgment).

Arkansas United v. Thurston, Case Nos. 22-2918, No. 23-1154, 157 F.4th 931 (8th Cir. 2025) (denying rehearing en banc).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

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STATEMENT OF JURISDICTION

The Eighth Circuit denied rehearing en banc on October 24, 2025. App. 106a-110a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 208 of Voting Rights Act provides that "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.A. § 10508.

The United States Constitution's Supremacy Clause provides: "This Constitution, and the Laws of the United

States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

Arkansas Code § 7-5-310(b)(4)(B), § 7-1-103(19)(C), and § 7-1-103(19)(b)(1) are reproduced in the Appendix at App. 112a-128a.

INTRODUCTION

For more than four decades, the Voting Rights Act (VRA) has guaranteed voters who are disabled or illiterate in English the right to assistance in casting a ballot from any person they choose, subject to two minor exceptions. But for any such voters in the jurisdiction of the Eighth Circuit Court of Appeals, that guarantee is now illusory. Having previously, and uniquely, foreclosed any private right to enforce the rights guaranteed in most of the VRA under the Act itself or through 42 U.S.C. § 1983, the Eighth Circuit has, in this case, barred anyone from suing to enforce the specific right guaranteed in section 208 of the VRA ("Section 208") through an injunctive action under *Ex parte Young* based on preemption. Voters in the Eighth Circuit now must rely on the federal government alone to enforce the Section 208 guarantee, even if the federal government lacks the resources, or the political will, to do so.

Two states in the Eighth Circuit, Arkansas and Missouri, impose by state law and enforce through

criminal law an arbitrary numerical limit on the number of voters a person may assist in any election, regardless of whether he or she is the chosen assistor of anyone beyond the arbitrary cap. In Arkansas, a person may only assist six voters in each election; in Missouri, the limit is one person outside of certain family members. Thus, the stand-alone positioning of the Eighth Circuit has real consequences in preventing voters from receiving the assistance they need to cast a meaningful ballot and participate in United States democracy.

This Court is currently considering whether to review another case raising whether the Eighth Circuit's foreclosure of a private right to sue under the VRA is correct. *See Turtle Mountain Band of Chippewa Indians v. Howe* (*Turtle Mountain*), Pet. for a Writ. of Cert. at i (No. 25-253) (September 2, 2025).[2] This case raises an issue specific to the stated guarantee in Section 208,[3] and an issue that could establish a serious, long-term impediment to the supremacy of federal law in this nation. Petitioners respectfully seek review to ensure that Eighth Circuit voters are not left uniquely unprotected.

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2. If the Court grants review of the *Turtle Mountain* case, Petitioners suggest that the Court hold this case and this petition in abeyance because reinstatement of a private right of action under the VRA or Section 1983 could resolve this action without need to address the Circuit's erroneous ruling under *Ex parte Young* and preemption.

3. While it is possible that some future state voting act could be preempted by section 2 of the VRA, the likelihood of state laws conflicting with the VRA is more clear and empirically true—in Arkansas and Missouri, for example—under section 208 of the VRA.

STATEMENT OF THE CASE

I. Statutory Framework

a. Section 208 of the Voting Rights Act codifies the right to voter assistance.

This Court has recognized the Voting Rights Act as "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)). Enacted in 1965 "to address entrenched racial discrimination in voting," *Shelby Cnty., Ala. v. Holder*, 570 U.S. 529, 534 (2013), "[p]assage of the Voting Rights Act of 1965 was an important step in the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote." *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009). Section 208, codified in the 1982 Voting Rights Act Amendments, continued this legacy in seeking to protect disabled and illiterate voters in need of voting assistance.

The VRA was amended several times to protect the rights of voters. Pub. L. No. 91-285, 84 Stat. 315 (1970); Pub. L. No. 94-73, 89 Stat. 400 (1975); Pub. L. No. 97-205, 96 Stat. 131 (1982). In 1982, Congress expressed concerns about problems facing disabled and illiterate voters, noting in the Senate Report that "people requiring assistance in some jurisdictions are forced to choose between casting a ballot under the adverse circumstances of not being able to choose their own assistance or forfeiting their right to vote." S. Rep. No. 97-417, at 62 (1982) *as reprinted in* 1982 U.S.C.C.A.N. 177, 240-41. The Senate Committee further

expressed that it was "concerned that some people in this situation do in fact elect to forfeit their right to vote." *Id.*

Congress ultimately codified Section 208, the VRA provision at issue in this case, during the 1982 Amendments to address these concerns. Section 208 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 passed Section 208 after finding that blind, disabled, and illiterate voters "are more susceptible than the ordinary voter to having their vote unduly influenced or manipulated." S. Rep. No. 97-417, 97th Cong., 2d Sess., at 62. The Senate Report explained that the element of choice was essential: "[H]aving assistance provided by election officials discriminates against those voters who need such aid because it infringes upon their right to a secret ballot and can discourage many from voting for fear of intimidation or lack of privacy." *Id.* at 62 n.207.

The legislative history of Section 208 further underscores Congress's intent to protect the right to vote of limited-English-proficient persons. The Senate Committee recognized that voters who were unable to read or write *include* "language minority" voters who lack proficiency in English. S. Rep. No. 97-417, 64 (1982).

Congress designed Section 208 to pair 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.

See 52 U.S.C. § 10503. In turn, Section 208 guarantees that limited-English-proficient voters who reside outside of those jurisdictions will have the right to bring an assistor to help them cast a ballot in their jurisdictions. *Id.*

Since Section 208's enactment, federal courts have routinely allowed both the federal government and private plaintiffs to bring suit to enforce the guarantees of Section 208. Over the past decades, courts have ruled in numerous cases primarily brought by private plaintiffs. *See Fla. State Conf. of NAACP v. Lee*, 576 F.Supp.3d 974, 988-90 (N.D. Fla. 2021) (listing cases).

b. Arkansas Election Code impedes the right to voting assistance.

Petitioners now echo the same concerns once voiced by Congress. In 2009, Arkansas enacted an amendment to its Election Code limiting voter assistance. The Arkansas Election Code states 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). The Election Code amendment prohibits voters from choosing the assistor of their choice once that individual has hit the arbitrary six-person limit. Under the Arkansas Election Code, violation of the six-voter cap by a voting assistor constitutes a Class A misdemeanor. Ark. Code Ann. § 7-1-103(19)(C) and (b)(1).

II. Voter assistance in Arkansas is imperative.

In recent years, Arkansas has experienced growth in Latino population and in eligible voters who require voting assistance based on limited English proficiency.

Local election officials from Benton, Sebastian, and Washington counties testified to the population growth. R. Doc. 148-3, at 22:12-18; 28:12-25 (Benton); R. Doc. 148-1 at 15:11-16:1; 16:5-8 (Sebastian); R. Doc. 148-4 at 15:5-7; 15:12-25 (Washington).

Access to voting assistance for limited-English-proficient voters varies throughout Arkansas. For example, Sebastian County does not have bilingual poll workers and relies on limited-English-proficient voters to bring their own voting assistors. R. Doc. 148-1 at 31:6-32:19; 18:14-19:12 (Sebastian). In the past, Sebastian County has not designated staff to ensure that language assistance is available to limited-English-proficient voters and provides no translated voting materials or signage for limited-English-proficient voters. R. Doc. 148-1 at 20:19-22; 33:18-35:15 (Sebastian). On the other hand, Benton County has attempted to disperse its bilingual poll workers (when it has any) to the vote centers where they are needed. R. Doc. 148-3 at 31:6-32:17 (Benton). Similarly, Washington County places its bilingual poll workers at certain polling places, but sometimes lacks poll workers and thus has to deploy bilingual "rover" workers for its polls. R. Doc. 148-4 at 18:8-15; 18:23-19:18; 22:9-22 (Washington).

a. No fraud in voter assistance.

Fraud is not a legitimate justification for impeding the rights of voters to choose their assistors in Arkansas. Local election officials testified that they could not recall any voter *assistance* fraud. Testimony regarding voter fraud at large was limited to incidents in which elderly voters mistakenly tried to vote on Election Day after

already voting by mail. In fact, Washington County and Sebastian County representatives testified that they did not know of, investigate, or turn anyone in for voter fraud. R. Doc. 148-4 at 55:3-6; 54:17-23; R. Doc. 148-1 at 41:19-42:15. State election officials testified that they could only identify phone calls about one occasion—in which a person drove voters to the polls. R. Doc. 134-5, at 26:7-24; R. Doc. 134-6, at 28:12-23.

b. Arkansas United is a trusted community organization assisting Arkansas election officials.

Plaintiff-Petitioner Arkansas United is a community-based, non-profit membership organization located in Springdale, Arkansas. App. 27a. Plaintiff-Petitioner L. Mireya Reith is the founder and executive director of Arkansas United. App. 27a.

Among many social services, Arkansas United provides voter assistance, citizenship workshops, and education on voter registration. App. 28a-29a. Arkansas United operates resource centers in Springdale and Little Rock, and provides Community Navigators, in 10 localities, who work in partnership with local service providers to connect qualified immigrants to their services. App. 41a. Arkansas United directly assists about 20,000 Arkansans every year through its various services. App. 28a-29a.

Voters have benefitted from Arkansas United's strong working relationship with the various counties in Arkansas. App. 29a. For example, Arkansas United assists Washington County with recruiting bilingual

poll workers and preparing Spanish-language voting instructions for the polling places, all in an effort to make voting accessible for limited-English-proficient voters. R. Doc. 148-4 at 16:5-17:3; 31:6-22; 38:17-39:5; 39:8-23; 40:12-24; 41:3-42:12 (Washington). Additionally, during the 2016 election, Washington County worked with Arkansas United to organize voting equipment demonstrations for the public at large. R. Doc. 148-4 at 39:8023 (Washington).

c. Voters were unable to vote with their preferred assistor because of Arkansas' six-voter cap.

Voters exercised their right to voter assistance with help of Arkansas United's services during the 2020 General Election. App. 30a. Arkansas United conducted its regular voter-education activities in the 2020 General Election, including providing voter assistance at the polls during the early-voting period and on Election Day. App. 29a.

One example of Arkansas United providing voter assistance was when Arkansas United staff member Celina Reyes assisted Susana Terrazas and her husband, Saul Octavio Acosta, with voting. App. 30a. Terrazas is Spanish-speaking, had no other person to help her vote, and did not see any bilingual poll workers when she voted with assistance from Arkansas United. App. 30a.

During the election period, Arkansas United received many requests similar to Terraza's request for language assistance. In fact, Arkansas United received requests from more voters than it was possible to assist under the statutory six-voter limit. About 100 voters wanted, and indeed, requested assistors from Arkansas United, but

had to be turned away due to the six-voter cap. R. Doc. 139-20 at 2. Without the six-voter limit, voters who choose assistors from among Arkansas United's staff members and volunteers would otherwise have been able to vote with aid from the assistor of their choice. R. Doc. 139-20 at 2-3.

On Election Day, Arkansas United experienced a spike in voter requests for election assistance. App. 32a. A poll worker from the Springdale Civic Center polling place came to the Arkansas United office and asked Arkansas United staff to assist voters who were arriving and who needed language assistance. App. 30a-31a. Unfortunately, an Arkansas United staff member who went to assist was quickly chosen by enough voters to hit the mandatory six-voter limit. App. 32a.

Because Arkansas United's staff members were only able to assist six voters each and feared facing criminal penalties if they assisted voters beyond the cap, they were forced to reject voters who chose them for assistance. App. 62a. In those situations, where the would-be voter was unable to speak, read or write in English, they were deemed unable to vote. R. Doc. 148-3, at 54:11-55:15 (Benton).

III. Plaintiffs challenge the Arkansas Election Code in district court.

In November 2020, Plaintiffs filed suit against the Arkansas State Board of Election Commissioners, which included the Secretary of State ("the State Election Board"), and the election officials of Washington, Benton, and Sebastian counties, alleging that provisions of the

Arkansas Election Code violated Section 208 of the Voting Rights Act by prohibiting voters from choosing an assistor who had already helped six other voters during an election. App. 33a. On November 3, 2020, the district court denied Plaintiffs' motion for a preliminary injunction. App. 33a.

Sebastian County, Benton County, and the State Election Board all moved to dismiss, arguing (among other things) that the suit was barred by sovereign immunity. App. 33a. The district court denied all three motions, holding that Plaintiffs appropriately brought their action under *Ex parte Young*. App. 87a. ("suits pursuant to *Ex parte Young* are an appropriate method of enforcing the VRA"). Applying the framework from *Ex parte Young*, 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*." App. 87a.

On August 19, 2022, following cross motions for summary judgment, the district court again applied *Ex parte Young*, stating, "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*." App. 54a.

The district court ultimately ruled, on the merits, that the six-voter cap and related criminal provisions are preempted under the Supremacy Clause. The district court observed that "[u]nder § 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." App. 57a.

Due to the limit on voter assistance, the district court concluded that "compliance with both [statutes] . . . [is] impossible" and the six-voter limit is preempted. App. 57a. (quoting *Pet Quarters, Inc. v. Depository Tr. & Clearing Corp.*, 559 F.3d 772, 780 (8th Cir. 2009)). The district court further concluded that Arkansas' six-voter limit "poses an obstacle to Congress's clear purpose to allow the voter to decide who assists them at the polls." App. 58a. The district court granted summary judgment in favor of Plaintiffs, denied summary judgment for Defendants, permanently enjoined Defendants from enforcing the six-voter cap, and awarded Plaintiffs attorneys' fees and costs. App. 63a-64a.

The State Election Board appealed, and the Eighth Circuit 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. Sep. 28, 2022) (order granting stay pending appeal).

IV. The Eighth Circuit reverses the district court and denies rehearing en banc.

On July 28, 2025, an Eighth Circuit panel reversed the district court's judgment. App. 13a. Following in the footsteps of *Arkansas State 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), the panel held that Section 208 does not allow for a private right of action. App. 6a. The panel further held "no private right of action is created by the Supremacy

Clause." App. 6a. The panel also concluded "equitable relief is not available for § 208 under [preemption] principles" because "§ 208 has its own enforcement structure." App. 12a. In holding that there is no cause of action, the panel did not otherwise address the district court's *Ex parte Young* holding, nor did it reach the merits of the case. App. 12a-13a.

Plaintiffs timely filed a petition for rehearing en banc on August 25, 2025. On October 24, 2025, the court denied Plaintiffs' petition, with Chief Judge Colloton, Judge Smith, Judge Kelly, and Judge Erickson voting to grant rehearing. App. 108a-110a.

Dissenting from the denial of rehearing, Chief Judge Colloton, with whom Judge Smith, Judge Kelly, and Judge Erickson joined, wrote that the "district court determined that the Arkansas statute at issue is preempted by federal law, and the panel did not address that point. The panel ruled instead that only the Attorney General of the United States can bring an action to challenge the Arkansas provision. The question is whether the plaintiffs in this case may seek equitable relief to enjoin enforcement of a preempted state statute." App. 108a.

Chief Judge Colloton further observed that the panel misconstrued *Armstrong* to mean that equitable relief is available only when no other remedy is available, when this Court has previously "held to the contrary." App. 109a (citing *Va. Off. for. Prot. & Advoc. v. Stewart*, 563 U.S. 247, 256 n.3 (2011)). He further noted that the Eighth Circuit, by virtue of denying rehearing, "continue[d] on a regrettable path of rendering unenforceable, in th[e] [Eighth Circuit] alone, the voting rights law that many

have considered 'the most successful civil rights statute in the history of the Nation.'" App. 109a (quoting *Allen v. Milligan*, 599 U.S. 1, 10 (2023)).

On January 14, 2026, the district court vacated its summary judgment order and amended summary judgment order, order on attorneys' fees, and judgment and amended judgment, entered judgment in favor of Defendants, and dismissed the case with prejudice.

REASONS FOR GRANTING THE PETITION

The Eighth Circuit's decision infringes on the rights of disabled and illiterate voters and undoes decades of federal voting rights jurisprudence. In entering its ruling, the Eighth Circuit uniquely asserted that Section 208 no longer allows for a private right of action by voters seeking to enforce their voting rights. In every other circuit, private plaintiffs may rely on decades of precedent to enforce the individual rights given to them by Congress in the Voting Rights Act. With this decision, the Eighth Circuit became the first and only appellate court in the nation to hold that Section 208 is not privately enforceable through an implied right of action. Furthermore, the decision prevents private plaintiffs from seeking equitable relief, under *Ex parte Young*, against a state law preempted by Section 208. The Eighth Circuit therefore removed any possibility of private enforcement of Section 208 in any of the states within its jurisdiction. This important issue merits this Court's review.

I. The Eighth Circuit's decision creates a sharp conflict with other circuits and departs from this Court's precedent.

The Eighth Circuit's restrictive position on private enforcement under the Voting Rights Act goes against unbroken decades-long civil rights practices in voting rights cases. By concluding that Section 208 is not privately enforceable, the Eighth Circuit set precedent conflicting with the holdings of federal courts across the country. The Eighth Circuit is the only appellate court in the nation to deny private plaintiffs the ability to file suit to enforce Section 208 of the VRA. In every other circuit, private plaintiffs may rely on the protections of Section 208 and enforce their right to vote with the assistor of their choice.

The Eighth Circuit's decision creates a sharp conflict with every other circuit. For example, the neighboring Fifth Circuit has allowed private plaintiffs to sue under Section 208. In *OCA-Greater Hous. v. Texas*, the Fifth Circuit reviewed a private plaintiff's challenge to a Texas voting law imposing a restriction on the interpretation assistance that Texas voters may receive. The district court sided with the plaintiffs, holding that the Texas Election Code conflicted with, and was thus preempted by, Section 208 of the VRA. *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 609-614 (5th Cir. 2017). The Fifth Circuit did not directly review whether Section 208 allowed for a private right of action, but stated that "federal jurisdiction over this case is proper." *Id.* at 612. Recently, the Fifth Circuit decided another Section 208 lawsuit on the merits, recognizing (without deciding) that private plaintiffs may sue under Section 208. *See La Union Del*

Pueblo Entero v. Abbott, 151 F.4th 273, 282 (5th Cir. 2025). The Sixth Circuit has similarly allowed private parties to sue under Section 208. *See Nelson v. Miller*, 170 F.3d 641, 647 (6th Cir. 1999).

The Eighth Circuit panel's decision here further conflicts with the holdings of all other federal courts that have presided over Section 208 claims, to the detriment of numerous voters needing assistance. *See*, *e.g.*, *League of Women Voters of Ohio v. LaRose*, 741 F. Supp. 3d 694, 710 (N.D. Ohio 2024) ("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) ("far from suggesting that Congress intended to preclude private parties from enforcing section 208, section 3 evinces Congress's intent to authorize such suits"); *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, 476 F. Supp. 3d 158, 235 (M.D.N.C. 2020) (allowing plaintiff to proceed with Section 208 preemption claim). No other federal court has come to the same conclusion as the Eighth Circuit.

The Northern District of Ohio, in *League of Women Voters of Ohio v. Larose*, allowed for private enforcement of Section 208. 741 F. Supp. 3d 694, 711 (N.D. Ohio 2024) ("Plaintiffs may pursue this action under Section 208 directly, or they may enforce Section 208 through a § 1983 claim."). In reaching this determination, the court noted, "the Sixth Circuit has already spoken to this issue and has found that the VRA permits suit by the Attorney General or aggrieved voters, including organizations." *Id.* at 709. The Northern District of Florida similarly held that private plaintiffs can bring claims to enforce

Section 208. *See Fla. State Conf. of NAACP v. Lee*, 576 F. Supp. 3d 974, 988-90 (N.D. Fla. 2021). There, voting rights organizations brought action against state elections officials regarding legislation limiting assistance to voters in line at polling places. *Id.* at 988. In ruling for the plaintiffs, the court concluded that "private parties may enforce section 208." *Id.* at 990. The court noted that "Congress clearly designed section 208 to enforce the Fourteenth Amendment's guarantees" and highlighted how "the VRA's plain text provides that private parties may enforce section 208." *Id.* Additionally, the court noted that, at the time, "every court to consider the issue has found that section 208 *does* implicitly allow private enforcement." *Id.* (emphasis in original).

The Eighth Circuit rendered a decision never before issued by any federal court nationwide in concluding that Section 208 does not contain a private right of action. In doing so, the panel created a result at odds with this Court's decisions that have long recognized the existence of private rights of action under the VRA. *See*, *e.g.*, *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) (five Justices in separate opinions held that there was a private action to enforce Section 10 of the VRA); *Allen v. State Bd. of Election*, 393 U.S. 544, 556-57 (1969) (holding that there was a private right of action to enforce Section 10 of the VRA).; *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (reviewing a case where private parties sought to bring action under Section 2 of the VRA).

For example, in *Morse v. Republican Party of Virginia*, five justices recognized that, while Section 2 of the VRA "provides no right to sue on its face, 'the existence of the private rights of action under Section 2

. . . has been clearly intended by Congress since 1965.'" 517 U.S. 186, 232 (opinion of Stevens, J., joined by Ginsburg, J.). Concurring justices further stated that "Congress intended to establish a private right of action to enforce § 10, no less than it did to enforce §§ 2 and 5." *Id.* (opinion of Breyer, J. joined by O'Connor and Souter, JJ.).

In addition to creating a circuit split and departing from the practice of allowing private parties to sue under Section 208 in federal courts, the Eighth Circuit panel established precedent—contrary to this Court's decisions—on when private plaintiffs may seek equitable relief against a preempted state law. This also creates a split with all other circuits that follow this Court's binding precedent on preemption and *Ex parte Young*. This Court has recognized that federal courts have a long-established practice of enjoining preempted state action. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 327 (2015). Over 115 years ago, this Court established the *Ex parte Young* doctrine, which allows private plaintiffs subject to criminal penalties under state law to seek injunctive relief against state officers who are violating federal law. *Id.* at 326-327. The Eighth Circuit's decision is in direct conflict with this precedent.

This Court's review is warranted because the Eighth Circuit's decision creates a sharp circuit split on private enforcement of the VRA and contravenes this Court's longstanding precedent on equitable relief against preempted state laws, foreclosing all available methods of enforcement for private plaintiffs under Section 208.

II. These are recurring important questions of federal law with significant implications for voters who need assistance to vote.

The Eighth Circuit panel has foreclosed any possibility of private enforcement of Section 208 in seven states. The panel has jeopardized voters needing assistance in Arkansas, Missouri, Iowa, Minnesota, Nebraska, North Dakota, and South Dakota, leaving them no recourse to defend their right to vote with the assistor of their choice. The implication of this decision is that vulnerable voters in Arkansas and possibly other states in the Eighth Circuit will be barred from receiving assistance from their chosen assistor and may not vote at all. This is not what Congress intended in enacting Section 208.

The panel's decision critically undermines Congress's intent to allow voters to choose their own assistor to protect the ability to vote without interference or coercion by poll workers. Congress has reiterated time and again its intent that the Voting Rights Act be privately enforceable. *See 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 VRA, as amended, clearly expresses an intent to allow private parties to sue the States."). The Eighth Circuit failed to observe Congress's intent.

This question of private enforcement under the VRA is an important one and will recur. A similar question of whether private plaintiffs may sue to enforce a different section of the Voting Rights Act—Section 2—has already been raised before this Court. *See Turtle Mountain Band of Chippewa Indians v. Howe*, Pet. for a Writ. of Cert. at

i (No. 25-253) (September 2, 2025); *see also State Bd. of Election Comm'rs v. Miss. State Conference NAACP*, Mot. to Aff. (No. 25-234) (Oct. 3, 2025).

Further, in the Eighth Circuit, the question of whether private parties can enforce Section 208 is at issue in another pending action. Private plaintiffs in Missouri filed a lawsuit challenging an even more restrictive state law that limits the number of voters an assistor can help during an election to no more than *one* voter, with the exception of a voter's immediate family members. The case is currently stayed pending a final outcome in this case and similar cases before this Court. If the Eighth Circuit's decision is left undisturbed, Congress's intent to allow voters to choose their own assistor to protect the ability to vote is at risk. Because private enforcement of the VRA is an important recurring issue, it warrants this Court's review.

III. *Ex parte Young* permits injunctive and declaratory relief to remedy violations of federal law by state actors.

This Court has historically recognized the equitable powers of federal courts to enjoin preempted state action. The doctrine established in this Court's decision in *Ex parte Young* provides a means for private plaintiffs to seek injunctive relief against state actors' violations of federal law. 209 U.S. 123 (1908); *see also Armstrong*, 575 U.S at 326 ("federal courts may in some circumstances grant injunctive relief against state officers who are violating . . . federal law."). Following this Court's precedent, the Sixth Circuit has specifically held that "*Ex parte Young* applies to give the federal courts jurisdiction" in Section 208

cases. *See Nelson*, 170 F.3d at 647. The ability to sue to enjoin unconstitutional actions by state officers does not rest on a private right of action in the Supremacy Clause, but rather an equitable "judge-made" remedy. *Armstrong*, 575 U.S at 327.

Nonetheless, a panel of the Eighth Circuit determined that Arkansas United could not rely on the equitable powers of the federal court to challenge a state law preempted by Section 208. App. 12a. Erroneously interpreting this Court's precedent in *Armstrong*, the panel concluded that equitable relief is not available for Section 208 because the statute has its own enforcement structure. *Id.*

In determining that equitable relief is not available for claims under Section 208, the Eighth Circuit panel applied the wrong legal framework. The panel decided that equitable relief is only available when no other remedy is available. App. 12a. As the dissenting appeals court judges noted, this Court "has held to the contrary." App. 109a. (Colloton, J., joined by Smith, Kelly, and Erickson, JJ., dissenting) (citing *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 256 n.3 (2011)). While this Court has reviewed a statute's available remedies in its consideration of available equitable relief, it has declined to hold as the Eighth Circuit did here. *Id.*; *Armstrong*, 575 U.S. at 328. Indeed, this Court recognized in *Armstrong* that a statutory remedy "might not, by itself, preclude the availability of equitable relief." *Id.*

In *Armstrong*, this Court held that the Medicaid Act—a judicially unadministrable federal statute—was

precluded from equitable relief. *Id.* In reaching this decision, this Court weighed both that the Medicaid Act is judicially unadministrable and the available statutory remedy in the Act. The Court's decision did not rest alone on the available statutory remedy under the Act, but rather weighed more on the fact that the Act is judicially unadministrable. *See id.* As the dissent in the Eighth Circuit acknowledged, "Unlike 'the judicially unadministrable' federal statute that precluded the availability of equitable relief in *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 328 (2015), § 208 of the Voting Rights Act is readily administrable." App. 109a. (Colloton, J., joined by Smith, Kelly, and Erickson, JJ., dissenting) (citing 52 U.S.C. § 10508; *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614-15 (5th Cir. 2017)).

Section 208's enforcement mechanism—through the Department of Justice—alone does not preclude equitable relief because Congress has not foreclosed seeking equitable relief under Section 208. *See Armstrong*, 575 U.S. at 328. Rather, Congress has reiterated time and again its intent that the Voting Rights Act be privately enforceable. The Voting Rights Act text and structure clarify Congress's intent. Congress amended Section 3 of the Voting Rights Act to provide enforcement authority to "aggrieved person[s]." 52 U.S.C.A. § 10302. Further, Congress has had over half a century to amend the Voting Rights Act to prevent it from preempting state laws but has chosen not to do so.

The panel was wrong to close the federal courts to Arkansas United's challenge of a preempted state law against the Secretary of State of Arkansas, the Arkansas State Board of Election Commissioners, and other

defendants. This Court's review is warranted to ensure that federal courts remain an available forum to challenge preempted state laws.

IV. Section 208 of the Voting Rights Act is privately enforceable.

The Eighth Circuit wrongly chose to apply its reasoning in *Arkansas NAACP*—that Section 2 is not privately enforceable—to decide this case. The Eighth Circuit's decisions on private enforcement of sections 2 and 208 of the VRA clash with this Court's precedent in *Allen v. Milligan*, where the Court confirmed that there can be an implied right of action for violations of the VRA. *Allen*, 599 U.S. at 1 (affirming the district court's determination that private party plaintiffs demonstrated a reasonable likelihood of success for a Section 2 VRA claim). The private enforceability of Section 208 of the VRA flows from the "broad purpose" of the VRA "to make the guarantees of the Fifteenth Amendment finally a reality for all citizens." *Allen*, 393 U.S. at 556-57. That includes vulnerable voters who are affected by the Arkansas Election Code and the Eighth Circuit's decision.

This Court is currently considering the Eighth Circuit's unprecedented holdings that neither the federal Voting Rights Act nor Section 1983 permit private parties to sue to protect their rights under Section 2 of the VRA. *See Turtle Mountain Band of Chippewa Indians v. Howe*, Pet. for a Writ. of Cert. at i (No. 25-253) (September 2, 2025). The Court's review and resolution of *Turtle Mountain* could resolve this action if private enforcement under the VRA or Section 1983 are reinstated. But regardless of a private right of action under the VRA or Section 1983,

Petitioners are allowed to seek equitable relief against a preempted state law that prevents vulnerable voters from casting a ballot with the assistor of his or her choice—as guaranteed by Section 208.

V. This case presents an excellent vehicle for review of the important questions presented.

The Eighth Circuit has committed a sharp deviation from precedent. No other courts of appeals or district courts have followed the Eighth Circuit's erroneous reasoning to hold that private parties cannot enforce Section 208 under the VRA or through principles of preemption via *Ex parte Young*. Addressing this issue will necessarily allow this Court to fully address the reasoning of the Eighth Circuit that created this conflict.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED JULY 28, 2025

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 22-2918,

ARKANSAS UNITED; L. MIREYA REITH,

Plaintiffs-Appellees,

v.

JOHN THURSTON, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF STATE OF ARKANSAS; SHARON BROOKS, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS; BILENDA HARRIS-RITTER, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS; WILLIAM LUTHER, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS; CHARLES ROBERTS, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS; JAMES SHARP, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS; J. HARMON SMITH, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS,

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Defendants-Appellants,

REMEE OELSCHLAEGER, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WASHINGTON COUNTY ELECTION COMMISSION; BILL ACKERMAN, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WASHINGTON COUNTY ELECTION COMMISSION; MAX DEITCHLER, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WASHINGTON COUNTY ELECTION COMMISSION; JENNIFER PRICE, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WASHINGTON COUNTY ELECTION COMMISSION; RUSSELL ANZALONE, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE BENTON COUNTY ELECTION COMMISSION; ROBBYN TUMEY, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE BENTON COUNTY ELECTION COMMISSION; HARLAN STEE, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE BENTON COUNTY ELECTION COMMISSION; DAVID DAMRON, IN HIS CAPACITY AS A MEMBER OF THE SEBASTIAN COUNTY ELECTION; LUIS ANDRADE, IN HIS CAPACITY AS A MEMBER OF THE SEBASTIAN COUNTY ELECTION; LEE WEBB, IN HIS CAPACITY AS A MEMBER OF THE SEBASTIAN COUNTY ELECTION; MEGHAN HASSLER, IN HER CAPACITY AS A MEMBER OF THE SEBASTIAN COUNTY ELECTION,

Defendants.

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STATE OF NEBRASKA; STATE OF ALABAMA; STATE OF ALASKA; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF INDIANA; STATE OF KENTUCKY; STATE OF LOUISIANA; STATE OF MISSISSIPPI; STATE OF MONTANA; STATE OF NEW HAMPSHIRE; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF TENNESSEE; STATE OF TEXAS; STATE OF UTAH; STATE OF WEST VIRGINIA; HONEST ELECTIONS PROJECT,

Amici on Behalf of Appellant(s),

UNITED STATES,

Amicus on Behalf of Appellee(s).

No. 23-1154

ARKANSAS UNITED; L. MIREYA REITH,

Plaintiffs-Appellees,

v.

JOHN THURSTON, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF STATE OF ARKANSAS; SHARON BROOKS, IN HER OFFICIAL CAPACITY

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AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS; BILENDA HARRIS-RITTER, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS; WILLIAM LUTHER, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS; CHARLES ROBERTS, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS; JAMES SHARP, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS; J. HARMON SMITH, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS,

Defendants-Appellants,

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OFFICIAL CAPACITY AS A MEMBER OF THE BENTON COUNTY ELECTION COMMISSION; ROBBYN TUMEY, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE BENTON COUNTY ELECTION COMMISSION; HARLAN STEE, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE BENTON COUNTY ELECTION COMMISSION; DAVID DAMRON, IN HIS CAPACITY AS A MEMBER OF THE SEBASTIAN COUNTY ELECTION; LUIS ANDRADE, IN HIS CAPACITY AS A MEMBER OF THE SEBASTIAN COUNTY ELECTION; LEE WEBB, IN HIS CAPACITY AS A MEMBER OF THE SEBASTIAN COUNTY ELECTION; MEGHAN HASSLER, IN HER CAPACITY AS A MEMBER OF THE SEBASTIAN COUNTY ELECTION,

Defendants.

UNITED STATES,

Amicus on Behalf of Appellee(s).

Appeal from United States District Court
for the Western District of Arkansas.

April 17, 2025, Submitted
July 28, 2025, Filed

Appendix A

Before LOKEN, GRUENDER, and GRASZ, Circuit Judges.

GRASZ, Circuit Judge.

In *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, 86 F.4th 1204 (8th Cir. 2023), *reh'g denied*, 91 F.4th 967 (8th Cir. 2024), we held there is no private right of action under § 2 of the Voting Rights Act (VRA). Here, we are asked to decide whether there is a private right of action under § 208 of the VRA. Like the provision at issue in *Arkansas State Conference*, we conclude the text and structure of § 208 do not create a private right of action. Likewise, we conclude no private right of action is created by the Supremacy Clause.

I.

In 2009, the Arkansas legislature enacted an amendment providing 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) (the Six-Voter Provision); 2009 Ark. Acts 658. Violating this provision is a Class A misdemeanor. Ark. Code Ann. § 7-1-103(a)(19)(C), (b)(1). The Six-Voter Provision also requires "poll workers at the polling site to make and maintain a list of the names and addresses of all persons assisting voters." *Id.* § 7-5-310(b)(5).

Here, Arkansas United, a non-profit organization that educates immigrants about the voting process, and L.

Mireya Reith, Arkansas United's founder and executive director (collectively, United), sued John Thurston, then-Secretary of State of Arkansas, members of the Arkansas State Board of Election Commissioners in their official capacities (collectively, the State), and various Arkansas county election officials in their official capacities (collectively, the Counties), asserting that the Six-Voter Provision is preempted by § 208 of the VRA. Section 208 of the VRA states, "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.

At 11:21 p.m. on November 2, 2020, the night before Election Day, United filed an emergency motion for a temporary restraining order or preliminary injunction against the State and the Counties, alleging the Six-Voter Provision burdened their ability to assist voters with limited English proficiency at the polls and conflicted with § 208 of the VRA. The district court denied the motion. The State and the Counties moved to dismiss the case, arguing, among other things, that United had no private right of action to enforce § 208. The district court denied their motions, reasoning a private right of action existed. After discovery, the parties filed cross-motions for summary judgment. In August 2022, the district court granted summary judgment in part for United, enjoining the State and the Counties and "all persons acting in concert with" the State and the Counties from enforcing the Six-Voter Provision, and denied the State's and the

Counties' summary judgment motions. The district court then issued an amended order to clarify it enjoined and further ordered the Arkansas State Board of Election Commissioners to issue a memorandum regarding the district court's rulings to all county boards by September 16, 2022, just thirty-eight days before voting was set to begin for the 2022 General Election.

Due to the proximity of both the deadline to issue the memorandum and the upcoming election, the State sought an emergency stay of the injunction, which the district court denied. The State then sought an emergency stay from this court. We granted a temporary administrative stay pending briefing by the parties, followed by a stay of the injunction pending appeal. The 2022 General Election thus proceeded with Arkansas's Six-Voter Provision in place. In January 2023, the district court granted United's motion for attorney fees and costs and awarded $103,030.43. On appeal, the State now challenges the district court's amended order and judgment granting in part United's motion for summary judgment, determining that private plaintiffs could sue to enforce § 208 of the VRA, and denying the State's summary judgment motion, as well as the district court's order awarding United attorney fees and costs.

II.

We review statutory interpretation issues de novo, *Ark. State Conf.*, 86 F.4th at 1208, and a district court's grant of a permanent injunction for abuse of discretion, *MKB Mgmt. Corp. v. Stenehjem*, 795 F.3d 768, 771 (8th

Cir. 2015). "Like substantive federal law itself, private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286, 121 S. Ct. 1511, 149 L. Ed. 2d 517 (2001). "The judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.* Statutory intent is determinative in interpreting whether a private right of action exists. *See id.* Where a statute does not "say when a private right of action is available . . . it is not [a court's] place to fill in the gaps, except when 'text and structure' require it." *Ark. State Conf.*, 86 F.4th at 1209 (quoting *Sandoval*, 532 U.S. at 288). "Under the modern test for implied rights of action, Congress must have *both* created an individual right *and* given private plaintiffs the ability to enforce it." *Id.*

Our decision in *Arkansas State Conference* guides us here. In *Arkansas State Conference*, a civic organization tried to bring an action under § 2 against the various Arkansas state officers, alleging that a reapportionment plan approved by the Arkansas Board of Apportionment unlawfully diluted black voters' influence in elections. *Id.* at 1207. We held that, based on the text and structure of the VRA, Congress did not give private plaintiffs the ability to sue under § 2 and concluded that § 3 did not create an implied private right of action for § 2. *Id.* at 1206-07, 1213.

We need not discuss the first step, whether § 208 creates an *individual right*, because United cannot prevail on the second step, whether § 208 has a *private*

remedy. *See id.* at 1209. Like § 2, the text of § 208 "itself contains no private enforcement mechanism." *Id.* at 1210. Section 208 speaks only of the assistance that a voter "may be given," 52 U.S.C. § 10508; it is silent as to "*who* can enforce it," *Ark. State Conf.*, 86 F.4th at 1210. *See* 52 U.S.C. § 10508. So, "[w]e must look elsewhere for the who." *Ark. State Conf.*, 86 F.4th at 1210. We turn to § 11 and § 12 of the VRA to find our answer.

Section 11(a) states, "No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of chapters 103 to 107 of this title . . . ." 52 U.S.C. § 10307(a). Section 12(d) states:

> Whenever any person has engaged or there are reasonable grounds to believe that any person is about to engage in any act or practice prohibited by section [11] of this title, . . . the Attorney General may institute for the United States, or in the name of the United States, an action for preventative relief, including an application for a temporary or permanent injunction . . . .

Id. § 10308(d). Notably, § 12 contains no "mention of private plaintiffs or private remedies." *Ark. State Conf.*, 86 F.4th at 1210. Moreover, "[t]he fact that § 12 lists criminal penalties among the potential remedies is strong evidence that it cannot provide a private right of action. . . . After all, private parties cannot seek prison time against violators." *Id.* at 1210 n.2. In other words, refusing to permit a person to vote who is entitled under § 208 may trigger an action by the Attorney General. *See* 52 U.S.C.

§§ 10307(a), 10308(d), 10508. And the Attorney General may file an action for preventative relief if a state official is going to carry out a state law that would violate § 208. *See id.* § 10308(d).

While the remedies for § 208 are narrow, it is "all the text provides." *Ark. State Conf.*, 86 F.4th at 1210. As the Supreme Court has put it, "[t]he express provision of one method of enforcing a substantive rule suggests that Congress intended to preclude others." *Sandoval*, 532 U.S. at 290. "If the text and structure of [§§ 208, 11, and 12] show anything, it is that 'Congress intended to place enforcement in the hands of the [Attorney General], rather than private parties.'" *See Ark. State Conf.*, 86 F.4th at 1211 (second alteration in original) (quoting *Freeman v. Fahey*, 374 F.3d 663, 665 (8th Cir. 2004)).

To find United's ability to privately enforce § 208, the district court looked to a purported escape hatch in § 3 of the VRA. It reasoned that Congress explicitly created a private right of action to enforce the entire VRA because § 3 contemplates "proceeding[s] instituted by . . . an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. § 10302(b). Not so. We have determined that "§ 3 sets ground rules in the types of lawsuits each can bring." *Ark. State Conf.*, 86 F.4th at 1213. It thus merely "recognizes that *some* voting-rights protections are enforceable by someone other than the Attorney General," and when that is true, "provides for various forms of equitable and other relief." *Id.* at 1211. Like we did in *Arkansas State Conference*, we reject the view that § 3

implicitly "created new private rights of action for every voting-rights statute that did not have one," which would require us to "conclude that Congress hid the proverbial 'elephant in a mousehole.'" *Id.* at 1212 (brackets omitted) (quoting *Turkiye Halk Bankasi A.S. v. United States*, 598 U.S. 264, 143 S. Ct. 940, 948, 215 L. Ed. 2d 242 (2023)). "'Congress . . . knows how to create a cause of action,' and it did not do so here." *Id.* (ellipses in original) (quoting *Hernandez v. Mesa*, 589 U.S. 93, 140 S. Ct. 735, 752, 206 L. Ed. 2d 29 (2020) (Thomas, J., concurring)).

With no private right of action to enforce § 208 available under § 3, we turn to United's next argument: whether one exists under the Supremacy Clause. United argues the district court separately determined a standalone private right of action existed under the Supremacy Clause. It did not. The district court decided a cause of action existed for § 208 and mentioned the Supremacy Clause only in reference to United's preemption argument. But even if it had, the Supreme Court has explained that the Supremacy Clause "creates a rule of decision," not a cause of action. *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324-25, 135 S. Ct. 1378, 191 L. Ed. 2d 471 (2015). "It instructs courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so." *Id.* at 325. To be sure, the Supreme Court has alluded to the possibility that preemption principles may be a source for equitable relief when no other remedy is available. *See id.* at 326-28. But because § 208 has its own enforcement structure, we conclude equitable relief is not available for § 208 under these principles. *See id.* United cannot succeed on this basis.

This brings us to the attorney fees and costs. The district court awarded $103,030.43 to United. The fees and costs were awarded under § 14(e) of the VRA, which provides that fees and costs may be awarded to a "prevailing party" in any action "to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. § 10310(e). Because we conclude neither the VRA nor the Supremacy Clause create a private right of action for § 208, United is not a prevailing party in an action to enforce voting guarantees. Thus, their award of fees and costs is vacated. *See Advantage Media, L.L.C. v. City of Hopkins*, 511 F.3d 833, 838-39 (8th Cir. 2008).

III.

In light of the foregoing, we reverse the grant of summary judgment for United and denial of summary judgment for the State, vacate the permanent injunction and award of attorney fees and costs, and remand for further proceedings consistent with this opinion.

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED JULY 28, 2025

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 22-2918

ARKANSAS UNITED; L. MIREYA REITH,

Plaintiffs-Appellees,

v.

JOHN THURSTON, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF STATE OF ARKANSAS; SHARON BROOKS, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS; BILENDA HARRIS-RITTER, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS; WILLIAM LUTHER, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS; CHARLES ROBERTS, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS; JAMES SHARP, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS; J. HARMON SMITH, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS,

Defendants-Appellants,

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REMEE OELSCHLAEGER, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WASHINGTON COUNTY ELECTION COMMISSION; BILL ACKERMAN, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WASHINGTON COUNTY ELECTION COMMISSION; MAX DEITCHLER, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WASHINGTON COUNTY ELECTION COMMISSION; JENNIFER PRICE, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WASHINGTON COUNTY ELECTION COMMISSION; RUSSELL ANZALONE, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE BENTON COUNTY ELECTION COMMISSION; ROBBYN TUMEY, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE BENTON COUNTY ELECTION COMMISSION; HARLAN STEE, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE BENTON COUNTY ELECTION COMMISSION; DAVID DAMRON, IN HIS CAPACITY AS A MEMBER OF THE SEBASTIAN COUNTY ELECTION; LUIS ANDRADE, IN HIS CAPACITY AS A MEMBER OF THE SEBASTIAN COUNTY ELECTION; LEE WEBB, IN HIS CAPACITY AS A MEMBER OF THE SEBASTIAN COUNTY ELECTION; MEGHAN HASSLER, IN HER CAPACITY AS A MEMBER OF THE SEBASTIAN COUNTY ELECTION,

Defendants.

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STATE OF NEBRASKA; STATE OF ALABAMA; STATE OF ALASKA; STATE OF FLORIDA; STATE OF GEORGIA; STATE OF INDIANA; STATE OF KENTUCKY; STATE OF LOUISIANA; STATE OF MISSISSIPPI; STATE OF MONTANA; STATE OF NEW HAMPSHIRE; STATE OF OHIO; STATE OF OKLAHOMA; STATE OF SOUTH CAROLINA; STATE OF TENNESSEE; STATE OF TEXAS; STATE OF UTAH; STATE OF WEST VIRGINIA; HONEST ELECTIONS PROJECT,

Amici on Behalf of Appellant(s),

UNITED STATES,

Amicus on Behalf of Appellee(s).

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Plaintiffs-Appellees,

v.

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BILENDA HARRIS-RITTER, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS; WILLIAM LUTHER, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS; CHARLES ROBERTS, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS; JAMES SHARP, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS; J. HARMON SMITH, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE ARKANSAS STATE BOARD OF ELECTION COMMISSIONERS,

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REMEE OELSCHLAEGER, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WASHINGTON COUNTY ELECTION COMMISSION; BILL ACKERMAN, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WASHINGTON COUNTY ELECTION COMMISSION; MAX DEITCHLER, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE WASHINGTON COUNTY ELECTION COMMISSION; JENNIFER PRICE, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WASHINGTON COUNTY ELECTION COMMISSION; RUSSELL ANZALONE, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE BENTON COUNTY ELECTION COMMISSION;

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ROBBYN TUMEY, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE BENTON COUNTY ELECTION COMMISSION; HARLAN STEE, IN HIS OFFICIAL CAPACITY AS A MEMBER OF THE BENTON COUNTY ELECTION COMMISSION; DAVID DAMRON, IN HIS CAPACITY AS A MEMBER OF THE SEBASTIAN COUNTY ELECTION; LUIS ANDRADE, IN HIS CAPACITY AS A MEMBER OF THE SEBASTIAN COUNTY ELECTION; LEE WEBB, IN HIS CAPACITY AS A MEMBER OF THE SEBASTIAN COUNTY ELECTION; MEGHAN HASSLER, IN HER CAPACITY AS A MEMBER OF THE SEBASTIAN COUNTY ELECTION,

Defendants.

UNITED STATES,

Amicus on Behalf of Appellee(s).

Appeals from U.S. District Court for the Western District of Arkansas - Fayetteville (5:20-cv-05193-TLB)

JUDGMENT

Before LOKEN, GRUENDER, and GRASZ, Circuit Judges.

Appendix B

This appeal from the United States District Court was submitted on the record of the district court, briefs of the parties and was argued by counsel.

After consideration, it is hereby ordered and adjudged that the grant of summary judgment for United States and denial of summary judgment for the State is reversed, the permanent injunction and award of attorney fees and costs is vacated, and the cause is remanded to the district court for proceedings consistent with the opinion of this court.

July 28, 2025

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Susan E. Bindler

APPENDIX C — AMENDED MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT IN THE WESTERN DISTRICT OF ARKANSAS, FAYETTEVILLE DIVISION, FILED SEPTEMBER 7, 2022

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

CASE NO. 5:20-CV-5193

ARKANSAS UNITED AND L. MIREYA REITH,

Plaintiffs,

V.

JOHN THURSTON, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF STATE OF ARKANSAS; 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; RENEE OELSCHLAEGER, BILL ACKERMAN, MAX DEITCHLER, AND JENNIFER PRICE, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WASHINGTON COUNTY ELECTION COMMISSION; RUSSELL ANZALONE, ROBBYN TUMEY, AND HARLAN STEE, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE BENTON COUNTY ELECTION COMMISSION;

Appendix C

DAVID DAMRON, LUIS ANDRADE, AND LEE WEBB, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE SEBASTIAN COUNTY ELECTION COMMISSION; AND MEGHAN HASSLER, IN HER OFFICIAL CAPACITY AS ELECTION COORDINATOR FOR THE SEBASTIAN COUNTY ELECTION COMMISSION,

Defendants.

AMENDED[1] MEMORANDUM OPINION AND ORDER

TABLES INTENTIONALLY OMITTED

I. INTRODUCTION

This is a voting rights lawsuit filed by Plaintiffs Arkansas United and L. Mireya Reith against Arkansas Secretary of State John Thurston and the Arkansas State Board of Election Commissioners ("the State Defendants") and the Benton, Sebastian, and Washington County Election Commission members, along with Sebastian County's Election Coordinator ("the County Defendants"). Defendants are all sued in their official capacities. Plaintiffs allege an Arkansas statute that forbids individuals from assisting more than six voters in casting their ballot violates Section 208 of the Voting Rights Act (VRA), a provision of federal law that allows

1. The Court has amended Part V of this opinion for the reasons stated in the Court's order issued on September 7, 2022, granting the State Defendants' Motion to Clarify.

voters who require assistance due to an inability to read or write to have the assistor of the voter's choice.

The parties agree there are no disputes as to the material facts and each move for summary judgment.[2] Plaintiffs argue § 208 of the VRA preempts the challenged provisions of the Arkansas Code as a matter of law, and therefore those provisions must be declared to violate the Supremacy Clause of the United States Constitution and permanently enjoined.[3] The State Defendants argue Plaintiffs lack Article III standing, the State Defendants are immune from suit, § 208 of the VRA does not extend to limited-English proficient (LEP) voters, and, even if it does, the six-voter limit does not conflict with § 208 of the VRA.[4] The County Defendants argue all claims against them must be dismissed on ripeness grounds.[5]

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2. The Court terminated the bench trial set for November 15, 2021.

3. The Court considered Plaintiffs' Motion for Summary Judgment (Doc. 137), Brief and Statement of Facts in support of the Motion (Docs. 138 & 139), the State Defendants' Brief and Statement of Facts in response (Docs. 149 & 150), the County Defendants' Brief and Statement of Facts in response (Docs. 151 & 152), and Plaintiffs' Replies (Docs. 161 & 162).

4. The Court considered the State Defendants' Motion for Summary Judgment (Doc. 134), Brief and Statement of Facts in support of the Motion (Docs. 135 & 136), Plaintiffs' Brief and Statement of Facts in response (Docs. 146 & 147), Plaintiffs' Appendix (Doc. 148), and the State Defendants' Reply (Doc. 155).

5. The Court considered the County Defendants' Motion for Summary Judgment (Doc. 131), Brief and Statement of Facts in support of the Motion (Docs. 132 & 133), and Plaintiffs' Brief and Statement of Facts in response (Docs. 144 & 145).

The Court finds that § 208 of the VRA covers LEP voters, Plaintiffs have standing to challenge Arkansas's voting restrictions, this case is ripe for review, and the State Defendants are not protected from suit by sovereign immunity. The Court further finds § 208 of the VRA preempts the six-voter limit found at § 7-5-310(b)(4)(B) of the Arkansas Code but does not preempt the assistor-tracking requirement at § 7-5-310(b)(5). Accordingly, and for the reasons stated more fully below, Plaintiffs' Motion for Summary Judgment (Doc. 137) is **GRANTED IN PART AND DENIED IN PART**, and the County and State Defendants' Motions for Summary Judgment (Docs. 131 & 134) are **DENIED**. Plaintiffs are entitled to relief as ordered in Part V of this opinion.

II. BACKGROUND

The Court begins with an explanation of the federal and state statutes involved in this case before turning to Plaintiffs' efforts to provide translation assistance to LEP voters during the 2020 General Election.

A. Section 208 of the Voting Rights Act

"Congress enacted the Voting Rights Act of 1965 for the broad remedial purpose of ridding the country of racial discrimination in voting." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (cleaned up). The VRA contains several different provisions meant to fulfill this remedial purpose. Section 2 of the VRA forbids any state or political subdivision from implementing voting practices that result in the denial or abridgment of the right of any citizen

to vote on account of race or color. Section 3 sets forth judicial remedies to be used by a court when the Attorney General or an aggrieved person institutes a proceeding to enforce the voting guarantees of the Fourteenth or Fifteenth Amendments. Section 4 forbids the adoption of any test or device to deny or abridge the right to vote on the basis of race or color in certain jurisdictions, and § 5 requires those jurisdictions to obtain clearance from the Department of Justice before changing any voting practice.[6]

In 1975, Congress amended the VRA to add § 203, which requires certain jurisdictions to provide translated voting materials. A jurisdiction is covered by § 203 if more than five percent of its voting-age citizens (or 10,000 of its voting-age citizens) are members of a designated language minority group and are "limited-English proficient" and "the illiteracy rate of the citizens in the language minority as a group is higher than the national illiteracy rate." 52 U.S.C. § 10503(b)(2)(A)(i). No jurisdiction in Arkansas is covered by § 203, and therefore no jurisdiction in Arkansas is required to provide translated voting materials.

The VRA provision at issue in this case, § 208, codified at 52 U.S.C. § 10508, was added when Congress reauthorized the VRA in 1982. The provision reads: "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

6. The jurisdiction designations in § 4 ("the coverage formula") were found unconstitutional in *Shelby County v. Holder*, 570 U.S. 529, 557 (2013), crippling § 5's preclearance regime.

than the voter's employer or agent of that employer or officer or agent of the voter's union." Unlike § 203, § 208 applies nationwide.

In enacting § 208, the Report of the Senate Judiciary Committee found that "[c]ertain discrete groups of citizens are unable to exercise their rights to vote without obtaining assistance in voting including aid within the voting booth" and "many such voters may feel apprehensive about casting a ballot in the presence of, or may be misled by, someone other than a person of their own choice." S. Rep. No. 97-417, at 62 (1982). The Senate Report explained that § 208 was necessary "to limit the risks of discrimination against voters in these specified groups and avoid denial or infringement of their right to vote." *Id.*

B. The Challenged Arkansas Statutes

Plaintiffs argue § 208 preempts §§ 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 Code.

Arkansas Code § 7-5-310 sets out Arkansas's rules related to privacy and voter assistance at polling places. Arkansas Code § 7-5-310(b)(4)(A)(i)—which has not been challenged—provides that a voter may be assisted by a person of his or her choice. Added in 2009, § 7-5-310(b)(4)(B) adds the restriction that "[n]o person other than [poll workers] shall assist more than six (6) voters in marking and casting a ballot at an election." Section 7-5-310(b)(5) further provides that "[i]t shall be the duty of the poll

workers at the polling site to make and maintain a list of the names and addresses of all persons assisting voters."

To enforce these provisions, § 7-1-103(a)(19)(C) provides that a person who assists a voter "in marking and casting the voter's ballot except as provided in § 7-5-310" may be subject to criminal penalties. Section 7-1-103(b)(1) makes such a violation a Class A misdemeanor.

According to the State Defendants, the purpose of the six-voter limit is to prevent assistors from unduly influencing voters' decisions in the voting booth. *See* Doc. 135, p. 7. In the State Defendants' view, absent the six-voter limit, "busloads of people" could come to the polls and be fraudulently assisted by the same individual. *Id.*

The State Board of Election Commissioners is charged with civil enforcement authority for the State's election laws, including the six-voter limit. The Board's enforcement process is primarily driven by a complaint system. If a complaint facially alleges a state election law violation, the Board investigates the claim and either dismisses the complaint, orders a sanction—a warning letter or fine—or refers the violation to the prosecutor's office for criminal prosecution. *See* Doc. 139-14, pp. 149, 153. During the 2018 election, the Board found probable cause that two individuals had violated the six-voter limit. In the case of Carlon Henderson, he admitted to assisting eight voters, and he agreed to settle the claim against him by accepting a Letter of Caution from the Board. Had Mr. Henderson not agreed to the settlement, he could have faced fines and possible referral for criminal prosecution.

The Board conducts statewide trainings for county election authorities. These trainings include instruction on how to implement the six-voter limit and how to track each voter assistor. The Board also issues a procedure manual for use by county election authorities that covers the same material.

The County Defendants are required by statute to "[e]nsure compliance with all legal requirements relating to the conduct of elections" and "[e]xercise [their] duties consistent with the training and materials provided by the State Board of Election Commissioners." Ark. Code Ann. §§ 7-4-107(a)(1)–(2). To comply with the six-voter limit and the assistor-tracking requirement, the County Defendants instruct poll workers to keep a list of all voters assisted and the person who assisted them. Each assistor fills out an Assisted Voter Card for each voter they help, filling in their own name and address and the name of the voter they assisted. The card specifies that all persons, other than a poll worker or county clerk, may assist no more than six voters during an election. *See*, *e.g.*, Doc. 148-16. The County Defendants have authority to report any suspected violations of the six-voter limit to either the Board or a prosecutor for criminal enforcement.

C. Arkansas United and the 2020 Election

Plaintiffs are Arkansas United, a non-profit organization located in Springdale, Arkansas, and L. Mireya Reith, the founder and executive director of the organization. Founded in 2010, Arkansas United advocates for immigrant populations in the state. Part of

the organization's mission is "to ensure that immigrants in Arkansas have the information and resources they need to become full participants in the state's economic, political and social life." (Doc. 4-1, ¶ 2). Arkansas United is funded by grants, donations, and approximately 600 members who pay dues to support the organization's mission. Among other services, the organization assists LEP voters, including both organization members and nonmembers, to translate their ballots at polling places. *See* Doc. 4-1, ¶ 14.[7]

Arkansas United also undertakes non-partisan, get-out-the-vote efforts within the immigrant community. These efforts include phone banking, text messaging, door-to-door canvassing, and providing car rides to the

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7. The State Defendants contend the only services Arkansas United offers to its members—as opposed to nonmembers—are immigration-related and meant for noncitizens who cannot vote. *See* Doc. 150, p. 7. This misconstrues the deposition testimony and fails to create a genuine dispute of fact. Ms. Reith was asked if "there are any services that are extended to members that are not extended to nonmembers," and she responded that the organization's legal services are for members but that it grants exceptions to assist nonmembers as well. (Doc. 134-1, pp. 76–77). This does not imply that legal services are the *only* services offered to members, as the State Defendants suggest. It is undisputed that Arkansas United offers both members and nonmembers many services beyond immigration law, including voter outreach and assistance.

The State Defendants go on to suggest—apparently because Arkansas United serves immigrant and minority populations—that all of the organization's 600 dues-paying members must be "noncitizens who are ineligible to vote." (Doc. 155, p. 3). This is a baseless argument completely contradicted by the record.

polls. From September 2020 until Election Day, November 3, 2020, Arkansas United staff and volunteers primarily focused on phone banking and answering calls to the organization's Spanish-language hotline to educate voters and encourage participation in the election. Arkansas United received a grant to perform its phone banking. The terms of that grant required Arkansas United to make 115,563 dials in Arkansas from September 1, 2020, through Election Day. Arkansas United receives no outside funding for the interpretation services it offers to voters.

In advance of the 2020 election, Arkansas United trained all its staff and volunteers—16 in total—to assist LEP voters at the polls. The organization's staff at the time included executive director Ms. Reith, legal coordinator Sohary Fonseca, civic engagement coordinator Celina Reyes, and fellow Aracelia Gonzalez.[8]

In October 2020, Ms. Reith met with her staff and explained that each staff member could assist only six voters per election. Given this limit and anticipating high demand for translation assistance, Arkansas United recruited volunteers specifically to assist voters during

8. The State Defendants' briefing asks the Court to not consider Ms. Gonzalez and Ms. Fonseca's declarations (Docs. 139-22 & 139-23) for the reasons stated in the State Defendants' response in opposition (Doc. 141) to Plaintiffs' Motion for Leave to File Out of Time (Doc. 140). After summary-judgment briefing was complete, the Court granted Plaintiffs' Motion for Leave to File Out of Time and declined to strike the two declarations. *See* Doc. 163. Any late disclosure of the declarations was harmless.

the 2020 election. *See* 139-20, ¶ 5; 139-22, ¶ 18. Because of the six-voter limit, the organization determined it would need to deploy additional staff and volunteers for this purpose. Arkansas United also encouraged voters to find alternative assistors, in the form of friends and family, because, given the six-voter limit, the organization would not have the capacity to help every voter who asked for its assistance. *See* 139-20, ¶ 5. Ms. Fonseca used a form to track the number of voters each staff member or volunteer helped to ensure compliance with the six-voter limit.

Some voters requested Arkansas United's interpretation assistance during early voting in the 2020 general election. For example, Ms. Reyes called Susana Terrazas, a registered voter in Springdale, to ask if she and her husband were planning on voting. *See* Doc. 148-6, pp. 4–5. Ms. Terrazas said yes. A few days later, Ms. Terrazas called Ms. Reyes back to ask for help. Ms. Terrazas and her husband had decided they would need help understanding their ballots because, while Ms. Terrazas reads and speaks some English, she is not fluent. Ms. Reyes met Ms. Terrazas and her husband at the polling place, where she translated portions of the ballot from English to Spanish to aid the couple. *See* Doc. 148-7. At least two other voters contacted Arkansas United for translation assistance during early voting. Ms. Gonzalez met them at their respective polling places to assist them.

On Election Day, six Arkansas United staff members and volunteers were phone banking at the organization's office in downtown Springdale. That morning, a poll worker from the Springdale Civic Center came to the

office to ask if the organization could send staff to the Civic Center polling place to assist LEP voters. While there were some bilingual poll workers at the site, there were not enough to keep up with the demand for translation assistance.

Ms. Reith obliged and instructed Ms. Fonseca and Ms. Gonzalez to alternate in shifts at the Civic Center. Ms. Fonseca assisted four voters with translating and understanding their ballot. For each voter she helped, she filled out an Assisted Voter Card and gave it to a poll worker. In the late afternoon, Ms. Fonseca returned to the office to continue phone banking.

Ms. Gonzalez had originally planned to phone bank all day at the Arkansas United office. Instead, she phone banked for four hours and then went to the Civic Center. Upon arrival, Ms. Gonzalez quickly assisted two voters with translation services. Because Ms. Gonzalez had already assisted two other voters during early voting, she had now helped a total of four voters. Once an Arkansas United staff member or volunteer assisted four voters—and thus were approaching the six-voter limit—the organization instructed them to ask another staff member or volunteer to prepare to takeover for them. *See* Doc. 139-22, ¶ 21. The volunteers recruited by the organization prior to election day were not able to help after all, and Ms. Gonzalez scrambled to find friends and relatives to fill in. *See id.* at ¶ 18. Her sister Margarita Gonzalez and Margarita's friend, Melissa Hernandez, agreed to come assist voters at the Civic Center.

By the time Margarita and Melissa arrived, Ms. Gonzalez had hit the six-voter limit. For each voter she helped, she filled out an Assisted Voter Card and gave it to a poll worker. Because she could no longer assist voters, she returned to the Arkansas United offices to continue phone banking.

That evening, Ms. Fonseca received a call that an Arkansas United volunteer had assisted four voters and more help was needed. Ms. Fonseca returned to the Civic Center to assist one additional voter, bringing her total to five. Margarita Gonzalez assisted five voters and Melissa Hernandez assisted four. Another Arkansas United volunteer, Jamie Cascante, assisted one voter at the Civic Center on Election Day.

In total, then, Arkansas United's staff and volunteers assisted at least 21 voters during the 2020 election. The majority of voters were assisted in Washington County. A few were assisted in Benton and Sebastian Counties.

The organization ultimately fell well short of its phone-banking goals. The organization completed only 76,166 dials of the 115,563 dials required by the terms of its grant. Arkansas United contends that many more calls would have been completed had it not had to divert resources to ensure its voter assistance program complied with the six-voter limit.

Appendix C

D. Procedural History

Plaintiffs first filed the original complaint in this matter and a motion for temporary restraining order on the night before Election Day in 2020. The Court denied that motion on Election Day. *See* Doc. 35. While the Court found Plaintiffs demonstrated a likelihood of success on the merits, the balance of the equities weighed strongly against modifying an election rule halfway through Election Day.

Sebastian County, Benton County, and the State Defendants then filed motions to dismiss the Amended Complaint based on inadequate service of process, failure to state a claim, sovereign immunity, standing, laches, and lack of indispensable parties. The Court denied those motions. *See* Doc. 102.

The Court now turns to issues raised by the cross-motions for summary judgment. The State and County Defendants argue Plaintiffs have failed to show this is a justiciable dispute under Article III's standing and ripeness requirements. The State Defendants also reassert their argument that sovereign immunity bars any suit against them. Plaintiffs seek summary judgment on the merits and ask the Court to declare that the challenged sections of the Arkansas Code are preempted by § 208 of the VRA and violate the Supremacy Clause of the United States Constitution; enjoin all Defendants from implementing or enforcing the challenged laws; and require Defendants to implement a remedial plan to ensure future compliance with § 208 of the VRA.

Appendix C

III. LEGAL STANDARD

Under Federal Rule of Civil Procedure 56(a), "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." The Court must review the facts in the light most favorable to the opposing party and give that party the benefit of any inferences that can be drawn from those facts. *Canada v. Union Elec. Co.*, 135 F.3d 1211, 1212–13 (8th Cir. 1997). The moving party bears the burden of proving the absence of a genuine dispute of material fact and that it is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(c); *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Nat'l. Bank of Commerce v. Dow Chem. Co.*, 165 F.3d 602, 606 (8th Cir. 1999).

"Where the parties file cross-motions for summary judgment," as the parties do here, the Court "view[s] each motion separately, drawing all inferences in favor of the nonmoving party." *Shea v. Millett*, 36 F.4th 1, 6 (1st Cir. 2022) (quoting *Fadili v. Deutsche Bank Nat'l Tr. Co.*, 772 F.3d 951, 953 (1st Cir. 2014)).

IV. DISCUSSION

A. Section 208's Protections Extend to Limited-English Proficient Voters

As a preliminary matter, the Court reiterates its prior finding that the voter-assistance protections in § 208 extend to voters with limited-English proficiency. *See* Doc. 102, pp. 10–12.

The plain language of § 208 compels this interpretation. Section 208 provides that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508. The text does not require the voter's "inability to read or write" be based on a disability rather than lack of education. The plain text encompasses anyone who cannot read or write the language the voting materials are written in. This squarely includes LEP voters, who lack the ability to read their ballot because they cannot read the English language.

The State Defendants' argument that § 208 only protects blind, disabled, and *illiterate* voters is unpersuasive. Even under this reading of the statute, voters who are "literate in the Spanish language but illiterate in English," *Cardona v. Power*, 384 U.S. 672, 675 (1966) (Douglas, J., dissenting), would nevertheless be covered by § 208, at least in a state, like Arkansas, that provides no Spanish-language voting materials.

The purpose of § 208 and its legislative history confirm the statute's plain language. *Cf. Wooden v. United States*, 142 S. Ct. 1063, 1072 (2022) (using "[s]tatutory history and purpose to confirm [the Court's] view of [a statute's] meaning"). Congress enacted § 208 to ensure those who required assistance to exercise their right to vote received the assistor of their choice. It would belie this purpose to exclude LEP voters—who cannot "read or write" the language the voting materials are printed in—from the

statute's protections. The Senate Report that discussed the addition of § 208 to the VRA recognized that "[c]ertain discrete groups of citizens are unable to exercise their rights to vote without obtaining assistance." S. Rep. No. 97-417, at 62 (1982). It defined these groups as including "those who either do not have a written language or who are unable to read or write sufficiently well to understand the election material and the ballot." *Id*. The Senate Report also described an exception to § 208's employer limitation for "voters who must select assistance in a small community composed largely of language minorities," where voters may have limited options for translation assistance. *Id*. at 64. Congress clearly contemplated that § 208's protections would reach LEP voters.

The Department of Justice has consistently interpreted § 208 the same way, having entered into judicially-enforced consent decrees with jurisdictions that failed to extend § 208's protections to non-English speakers.[9] So have courts, which consistently uphold

9. *See* Consent Decree, Judgment, and Order, *United States v. Fort Bend Cnty.*, No. 4:09-cv-01058 (S.D. Tex. Apr. 13, 2009) (requiring county to allow Spanish-speaking voters with limited English proficiency to be assisted by the person of their choice pursuant to § 208); Memorandum of Agreement, *United States v. Kane Cnty.*, No. 07 C 5451 (N.D. Ill. Nov. 7, 2007) (same); Consent Decree, Judgment, and Order, *United States v. Brazos Cnty.*, No. H-06-2165 (S.D. Tex. June 29, 2006) (same); Consent Decree, *United States v. Orange Cnty.*, No. 6:02-cv-737-ORL-22JGG (M.D. Fla. Oct. 8, 2002) (same); Settlement Agreement, *United States v. City of Philadelphia*, No. 2:06cv4592 (E.D. Pa. June 4, 2007) (requiring city to allow limited-English-proficient Spanish-speaking voters to be assisted by the person of their choice pursuant to § 208); Revised

challenges to state laws by individuals and organizations asserting that § 208 extends to LEP voters. The Fifth Circuit in *OCA-Greater Houston v. Texas* affirmed the district court's grant of summary judgment in favor of plaintiffs alleging § 208 preempted a Texas law that set certain minimum requirements for who could serve as an interpreter at the polls. 867 F.3d 604, 616 (5th Cir. 2017); *see also Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 816 (E.D. Mich. 2020) (finding the plaintiffs adequately pleaded their claim that § 208 preempted a state law placing additional restrictions on who could assist LEP voters); *Nick v. Bethel*, 2008 WL 11456134 (D. Alaska Jul. 30, 2008) (granting preliminary injunction based on a finding that plaintiffs had demonstrated a likelihood of success on their claim that the state violated § 208 when it prevented Alaska Native Yup'ik-speaking voters from having assistance from a person of their choosing); *United States v. Berks Cnty.*, 277 F. Supp. 2d 570 (E.D. Pa. 2003) (holding that denying Spanish-speaking voters assistance by a person of their choice violated § 208).

The text of § 208 is clear that LEP voters receive its protections, and Defendants have failed to identify any authorities to the contrary.

B. Plaintiffs have Standing

Under Article III of the United States Constitution, federal courts can only decide actual "Cases" and

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Agreed Settlement Order, *United States v. City of Springfield*, No. 06-301-23-MAP (D. Mass. Sept. 15, 2006) (same).

"Controversies" between two or more parties—the validity of a statute cannot be decided in the abstract. U.S. Const. art. III, § 2, cl. 1. Therefore, to have standing to sue, a plaintiff must show "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which [federal courts] so largely depend[] for illumination of difficult . . . questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962).

At the motion-to-dismiss stage, the Court found Plaintiffs had adequately alleged Article III standing in their Amended Complaint. Now, with discovery complete and the undisputed evidence before it, the Court confirms that Plaintiffs have standing to challenge the six-voter limit and associated statutory provisions.

A plaintiff organization may establish standing in two ways: organizational standing and associational standing.[10] An entity may assert organizational standing when a challenged action or statute directly injures the entity's interests. In such a case, the court "conduct[s] the same inquiry as in the case of an individual," *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982), and the entity must "establish (1) an injury in fact; (2) a causal connection between the injury and the challenged law; and (3) that a favorable decision is likely to redress their injury," *Telescope Media Grp. v. Lucero*, 936 F.3d

10. The Court focuses its standing inquiry on Arkansas United, rather than Ms. Reith, because in a multi-plaintiff suit, only one plaintiff need satisfy the constitutional standing requirements. *See Horne v. Flores*, 557 U.S. 433, 446–47 (2009).

740, 749 (8th Cir. 2019) (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016)).

An entity that is not directly injured may nevertheless assert associational standing on behalf of its injured members. *See Higgins Elec., Inc. v. O'Fallon Fire Prot. Dist.*, 813 F.3d 1124, 1128 (8th Cir. 2016). To establish associational standing, the entity must show: (1) its members would have standing to sue in their own right; (2) the suit seeks to protect interests germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

The State Defendants argue Plaintiffs lack standing because Plaintiffs are not "aggrieved persons" under the VRA, cannot assert the rights of unknown third-party voters, fail to state a resource-diversion injury, and fail to show associational standing.[11] Plaintiffs respond that

11. In a footnote, the State Defendants also point out that the six-voter limit applies only to individuals who "*assist* more than six (6) voters in *marking* and *casting* a ballot," § 7-5-310 (b)(4)(B) (emphasis added), and Ms. Reith testified that her staff does not physically mark or cast ballots for voters when they translate ballot language for voters. (Doc. 135, p. 8 n.6). However, the State Defendants have not argued this case is moot because translation is not considered assistance under Arkansas law. In fact, the deposition testimony of the state election officials indicated the six-voter limit applies to translation assistance, and there is no dispute that Arkansas United's staff and volunteers were required to complete Assisted Voter Cards—which state that assistors are subject to the six-voter limit—for providing translation assistance. *See* Docs. 148-8,

they have established both organizational standing—"as an entity 'directly' affected by the challenged voter-assistance restrictions"—and associational standing because its members are voters injured by the challenged statutes. (Doc. 146, p. 13). The Court finds Arkansas United has established organizational standing and, therefore, does not address associational standing.

1. Arkansas United Suffered an Injury-in-Fact

An injury-in-fact is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560 (1992) (internal citations and quotation marks omitted). An organization may establish injury-in-fact by showing it had to divert some of the organization's resources to counteract the challenged law. In *Havens Realty*, the Supreme Court held that an organization fighting racial discrimination in housing had standing to challenge a realty company's allegedly discriminatory practices under the Fair Housing Act (FHA). 455 U.S. at 379. The organization alleged the realty company's practices caused it to "to devote significant resources to identify and counteract" those practices. *Id.* The Court found the plaintiffs adequately alleged a resource drain that "perceptibly impaired [the organization's] ability to provide counseling and referral

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pp. 106–108; 139-21, p. 17; 148-16. The Court also observes that the plain meaning of "assist[ing]" a voter to "mark[]" their ballot would seem to include translation services. The Court is satisfied that the six-voter limit applies to translation assistance and have been so interpreted and enforced by state and county officials. Therefore, a live controversy exists between the parties.

services for low-and moderate-income homeseekers," and, if proved, would constitute a "concrete and demonstrable injury to the organization's activities." *Id.*

In *OCA-Greater Houston*, the Fifth Circuit found organizational standing in a case similar to the one at bar. There, a voting rights organization challenged a Texas law that set certain requirements for who could serve as an interpreter in the voting booth. The court found the challenged law forced the plaintiff organization to "calibrate[] its outreach efforts to spend extra time and money educating its members about the[] Texas provisions and how to avoid their negative effects." *OCA-Greater Houston*, 867 F.3d at 610. For example, the plaintiff's employees and volunteers had to "spend more time on each call (and reach fewer people in the same amount of time)" to explain the requirements of Texas's law to voters. *Id.* This diversion of resources created an injury-in-fact for organizational standing.

The undisputed evidence shows Arkansas United similarly suffered a resource-diversion injury during the 2020 election. The six-voter limit caused Arkansas United to spend time recruiting volunteers to serve as voter assistors. *See* 139-20, ¶ 5; 139-22, ¶ 18. On Election Day, Arkansas United's staff had to spend time coordinating and tracking their voter assistance efforts and traveling back and forth from their office to the Springdale Civic Center. *See* Docs. 148-11, ¶ 11; 148-13, ¶¶ 21, 26, 28; 148-14, ¶¶ 13, 17. Much of this planning would not have been necessary if a single staff member or volunteer could assist an unlimited number of voters. For example, after Ms.

Fonseca had assisted four voters and returned to the office to continue phone banking, a volunteer called and asked that she return to the Civic Center because the volunteer had assisted four voters and was worried she would hit the limit. *See* Doc. 148-14, ¶ 17. Ms. Fonseca returned to the Civic Center and provided translation services to an additional voter. *Id.* As Ms. Gonzalez approached and eventually reached the six-voter limit, she had to spend additional time finding a replacement for herself to assist the line of LEP voters at the Civic Center. *See* Doc. 148-13, ¶¶ 26, 28.

The additional coordination associated with the six-voter limit diverted resources from Arkansas United's phone-banking efforts and contributed, at least in part, to the organization failing to meet the phone-banking goals required by its grant. *See* Docs. 148-11, ¶ 7; Doc. 148-13, ¶ 22. Because Arkansas United intends to continue providing interpretation services at the polls in future elections, this resource-diversion injury will recur.

The State Defendants half-heartedly argue that Arkansas United suffered no resource-diversion injury because the organization "had no formal arrangement with Washington County to provide language assistance at the polls during the 2020 general election" and the organization's phone banking was not "*materially* impeded as a result of Arkansas's six-voter limit." (Doc. 135, p. 16 (emphasis added)). It is irrelevant that Arkansas United did not have a formal arrangement to provide voter assistance. Both its assistance to LEP voters and phone banking serve the organization's mission to promote civic

engagement among Arkansas's immigrant population, and the six-voter limit hindered those efforts.

The issue is not whether Arkansas United's efforts were "materially impeded." It is true Arkansas United would have had staff and volunteers assisting voters regardless of the six-voter limit, and anyone who reached the limit could simply return to phone banking. But the six-voter limit did necessitate additional planning, coordination, and time that could have been spent elsewhere. This easily surpasses the "'perceptible impairment' of an organization's activities [that] is necessary for there to be an 'injury in fact.'" *Moya v. U.S. Dep't of Homeland Sec.*, 975 F.3d 120, 129 (2d Cir. 2020) (quoting *Nnebe v. Daus*, 644 F.3d 147, 157 (2d Cir. 2011)); *see also OCA-Greater Houston*, 867 F.3d at 612 ("To be sure, OCA's injury was not large. But the injury alleged as an Article III injury-in-fact need not be substantial . . . .").

The State Defendants argue Plaintiffs have suffered no injury because § 3 of the VRA provides for procedures courts must use "[w]henever the Attorney General or an aggrieved person institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment," and Plaintiffs are not "aggrieved persons" under the VRA. 52 U.S.C. § 10302. According to the State Defendants, only a voter who has been denied the assistor of their choice is an "aggrieved person" who may sue to enforce § 208.

Assuming the State Defendants are correct that a plaintiff organization must be an "aggrieved person"

under § 3 of the VRA in order to sue under § 208, the term "aggrieved person" is sufficiently broad to encompass a minority-rights organization suing to enforce § 208's protections.[12]

When assessing a plaintiff's standing to sue under a particular statute, courts "presume that a statute ordinarily provides a cause of action 'only to plaintiffs whose interests fall within the zone of interests protected by the law invoked.'" *Bank of Am. Corp. v. City of Miami.*, 137 S. Ct. 1296, 1302 (2017) (quoting *Lexmark Int'l,*

12. While the judicial procedures prescribed by § 3 may not include an express right of action on their own, they do evince Congress's intent for private parties to be able to sue under the VRA. The Supreme Court has long found—consistent with § 3 and the VRA's remedial purpose—that a right of action exists for private parties to enforce the VRA's various sections. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 556–557 (1969) (holding that private parties may enforce § 5 of the VRA); *Chisom*, 501 U.S. at 404 (allowing private plaintiffs to sue under § 2 of the VRA); *Morse v. Republican Party of Va.*, 517 U.S. 186, 234, 240 (1996) (five justices, in otherwise splintered opinions, held there is a private right of action to enforce § 10 of the VRA); *but see Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 2022 WL 496908, at *15–24 (E.D. Ark. Feb. 17, 2022) (distinguishing well-established precedent and finding there is no private right of action under § 2 of the VRA).

As for § 208, "every court that has considered the issue—and the Attorney General of the United States—agree that private parties may enforce" it. *Fla. State Conf. of NAACP v. Lee*, 576 F. Supp. 3d 974, 990 (N.D. Fla. 2021) (collecting cases). In any event, the State Defendants agree that Plaintiffs have a cause of action under § 208 but dispute that an organization can be an "aggrieved person" that has standing to sue.

Inc. v. Static Control Components, Inc., 572 U.S. 118, 129 (2014)). In *Bank of America*, the Supreme Court held that "aggrieved person" under the FHA included the City of Miami, which was suing the defendant bank for "hinder[ing] the City's efforts to create integrated, stable neighborhoods." *Id.* at 1304. The Court observed that the FHA's "aggrieved person" language "reflects a congressional intent to confer standing broadly." *Id.* at 1303.

The State Defendants principally rely on *Roberts v. Wamser*, 883 F.2d 617, 624 (8th Cir. 1989). Michael Roberts was a Black candidate in the Democratic primary for President of the Board of Alderman in St. Louis, Missouri. Roberts lost the primary by just 171 votes. Roberts sued the Board of Alderman alleging, in part, "that the Board's use of [a] punch-card voting system resulted in the failure to count a disproportionate number of ballots cast by black voters" and violated § Two of the VRA. *Id.* at 619–20. The Eighth Circuit held that Roberts did not have standing because he "is not an aggrieved voter suing to protect his right to vote. Nowhere in his complaint (or anywhere else) does Roberts claim that his right to vote has been infringed because of his race. Nor does Roberts allege that he is suing on behalf of persons who are unable to protect their own rights." *Id.* at 621. The court further reasoned that Roberts could not sue under the VRA because "purpose of the Voting Rights Act is to protect minority voters, not to give unsuccessful candidates for state or local office a federal forum in which to challenge elections." *Id.* at 621.

Roberts is quite different from the instant case. Roberts was a political candidate—not a nonprofit organization—who was not seeking to protect the rights of voters. The Eighth Circuit's concern that Congress did not intend for failed political candidates to be able to sue under the VRA is not implicated in this case. Here, Arkansas United is effectuating the purpose of the VRA to protect minority voters by challenging a law it alleges infringes on the statutory right of its LEP members, and other LEP voters in Arkansas, to an interpreter of their choice. The record shows LEP voters, exercising their right under § 208, choose Arkansas United and its staff to translate for them at the ballot box. Ms. Terrazas and her husband specifically asked Ms. Reyes to meet them at their polling place to translate for them. *See* Docs. 148-6, pp. 4–5; 148-7. Two voters contacted Ms. Gonzalez with the same request during early voting. *See* Doc. 148-13, p. 20. And Arkansas United's members include LEP voters who require assistance to vote. *See* Doc. 4-1, ¶ 34.

The weight of authority further contradicts the State Defendants' position. In *Havens Realty*, the Supreme Court found a fair-housing organization had organizational standing under the Fair Housing Act even though the organization was not seeking housing on its own behalf. *See* 455 U.S. at 379. In *OCA-Greater Houston*, the Fifth Circuit found a voting-rights organization had organizational standing to enforce § 208 of the VRA even though the organization was not a voter denied their assistor of choice. 867 F.3d at 610.[13]

13. *See also Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165–66 (11th Cir. 2008) (organizations challenging the

Therefore, Arkansas United—a minority-rights organization—and its members are well within the "zone of interests" of the VRA's mandate to eliminate discrimination against minority groups in voting and, more specifically, § 208's mandate that LEP voters receive the assistor of their choice. The law is clear that an organization may establish organizational standing when it is forced to divert resources to respond to a state's alleged violation of federal law. Arkansas United has made that showing here and has suffered an injury-in-fact as a result.

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state procedures for first-time registrants alleged an injury-in-fact sufficient to support organizational standing where the plaintiff organizations "reasonably anticipate that they will have to divert personnel and time to educating volunteers and voters on compliance with [the registration requirements] and to resolving the problem of voters left off the registration rolls on election day"); *Common Cause Ind. v. Lawson*, 937 F.3d 944, 952 (7th Cir. 2019) (plaintiff entity was injured where it had "devoted additional time and resources to ameliorating" the effects of a state voter roll provision that would automatically remove a voter from the state roll based on information from a third-party database); *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1039 (9th Cir. 2015) (plaintiff organization's alleged injury of diversion of resources supported lawsuit alleging state's failure to comply with a federal law intended to facilitate voter registration by low-income citizens and those with disabilities); *Scott v. Schedler*, 771 F.3d 831, 837 (5th Cir. 2014) (plaintiff organization had standing to sue for state's failure to provide recipients of federal benefits with voter registration forms, as required by the National Voter Registration Act, where the plaintiff organization alleged it had to devote resources to counteract the violation).

2. Arkansas United has shown Causation and Redressability

Having shown an injury-in-fact, Arkansas United must show "a causal connection between the injury and the challenged law; and . . . that a favorable decision is likely to redress their injury." *Telescope Media*, 936 F.3d at 749 (citing *Spokeo*, 578 U.S. at 338). The organization easily satisfies these requirements. *See OCA-Greater Houston*, 867 at 613 ("The facial invalidity of a Texas election statute is, without question, fairly traceable to and redressable by the State itself and its Secretary of State, who serves as the 'chief election officer of the state.'" (quoting Tex. Elec. Code § 31.001(a)).

As explained above, Arkansas United diverted resources from its phone-banking efforts to spend time coordinating and planning compliance with the six-voter limit. The challenged laws directly caused Arkansas United's resource-diversion injury, and the State and County Defendants are the parties that enforce those laws. The State Defendants conduct trainings, provide guidance, and enforce penalties for violations of the six-voter limit. If necessary, they refer violators for criminal prosecution. The County Defendants ensure the Assisted Voter Cards are completed and refer any violations of the six-voter limit to the State Defendants or directly to the county prosecutor. Just as Defendant's enforcement efforts caused Arkansas United's injury, an order from this Court enjoining Defendants from performing those actions would redress Plaintiff's injury in all future elections.

Appendix C

C. This Dispute is Ripe

The County Defendants argue the Court lacks subject matter jurisdiction over the claims against the County Defendants "because those claims have not ripened (and will, apparently, never ripen) into a justiciable case or controversy." (Doc. 132, p. 3).

"[T]he ripeness inquiry requires examination of both the 'fitness of the issues for judicial decision' and 'the hardship to the parties of withholding court consideration.' *Neb. Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1038 (8th Cir. 2000) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). An issue is unfit for judicial review if it is based on a "hypothetical or speculative disagreement[]," *id.*, and "[t]he hardship prong asks whether delayed review 'inflicts significant practical harm' on the plaintiffs," *Parrish v. Dayton*, 761 F.3d 873, 875 (8th Cir. 2014) (quoting *Ohio Forestry Ass'n, Inc. v. Sierra Club*, 523 U.S. 726, 733 (1998)).

The County Defendants argue Plaintiffs' claims against the County Defendants are too speculative to be fit for judicial resolution and Plaintiffs would suffer no hardship if the Court were to not enjoin the County Defendants.

The County Defendants point to the Eighth Circuit's opinion in *Public Water Supply District No. 10 of Cass County v. County of Peculiar*, 345 F.3d 570 (8th Cir. 2003). There, the plaintiff water district sought a declaratory judgment that the defendant municipality was "illegally

acting to dissolve the District," along with damages under 42 U.S.C. § 1983. *Id.* at 571.The court held that the case was not ripe because the water district's injury was too speculative. *Id.* at 573. The court explained: "There is no contention that the District is suffering an injury now. The only possible injury to the District is dissolution under § 247.220. Yet no petition for dissolution has been filed, and it is not clear that a petition will ever be filed." *Id.* The court further reasoned that the case was currently unfit for judicial resolution because "issue is not a purely legal one" and "would benefit from further factual development." *Id.* at 574. This bears little resemblance to the case at bar.

Here, the challenged statutes have already been enforced against Arkansas United's staff members. Its staff were required by county employees to fill out Assisted Voter Cards for each voter they helped during the 2020 election, and Aracelia Gonzalez reached the six-voter limit and ceased providing translations for fear of criminal prosecution. Plaintiffs need not subject themselves to criminal prosecution before challenging a statute's validity. *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979). If the six-voter limit remains in effect, there is no dispute Plaintiffs will have to comply with it in future elections. And the merits of this case—whether federal law preempts the challenged Arkansas statutes—requires no additional factual development.

The County Defendants further argue this controversy is too speculative because Plaintiffs improperly assume that if the Court "strike[s] down the 6-voter limit in

Arkansas law . . . each County will continue to enforce the limit in defiance of the Court's order." (Doc. 132, p. 7). In other words, the County Defendants contend the Court need not enjoin them because—should this Court "strike down" the six-voter limit—they will follow that order regardless. This argument misunderstands the role of federal courts and the remedies those courts may issue. A federal court cannot strike a statute from the Arkansas Code. *See Steffel v. Thompson*, 415 U.S. 452, 469 (1974). Rather, federal courts may declare statutes invalid and enjoin their enforcement. In so doing, "the court enjoins, in effect, not the execution of the statute, but the acts of the official." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923).

There is no dispute that the County Defendants play a significant role in implementing and enforcing the six-voter limit. *See 281 Care Comm. v. Arneson*, 638 F.3d 621, 632 (8th Cir. 2011) (explaining that a defendant official must have "some connection" to a challenged statute to be a proper party but that official "does not need to be the primary authority to enforce the challenged law"). County poll workers require each voter assistor to fill out an Assisted Voter Card, which informs the assistor that they may not assist more than six voters in any election. If a county election commission were to discover that an individual may have assisted more than six voters in a given election, the commission can either report that information to the State Election Commission for investigation or directly refer the complaint to the county prosecutor.

Given the significant role played by the counties in enforcing the six-voter limit, the disagreement between Plaintiffs and the County Defendants is far from hypothetical or speculative. The Court must enjoin the actions of the County Defendants to ensure a favorable ruling for Plaintiffs is carried out.

It also does not matter that "[t]he Arkansas election law does not vest county Election Commissions with the authority to deviate from the six voter assistance limit embedded in Arkansas law." (Doc. 132, p. 4). If that were the test, a dispute could never ripen—Arkansas law does not appear to vest *any* agency with the discretion to ignore the six-voter limit.

Therefore, while the Court has no doubt the County Defendants would follow this Court's decision whether they were a party to this case or not, the Court finds the County Defendants are a proper party to be enjoined from enforcing the challenged statutes. The Court is satisfied that this dispute is ripe for decision with respect to both the State and County Defendants.

D. Sovereign Immunity Does Not Bar Plaintiffs' Suit

The State Defendants renew their argument from the motion-to-dismiss phase that they are immune from suit based on sovereign immunity. State sovereign immunity, as enshrined in the Eleventh Amendment, prevents a federal court from hearing a suit against a state by a citizen of that state. *Hans v. Louisiana*, 134 U.S. 1, 11 (1890).

Plaintiffs point to two exceptions to sovereign immunity that allow their suit. First, Congress may abrogate state sovereign immunity when it acts pursuant to its enforcement power under § 5 of the Fourteenth Amendment and § 2 of the Fifteenth Amendment, so long as its intention to do so is "unmistakably clear in the language of the statute." *Dellmuth v. Muth*, 491 U.S. 223, 228 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242 (1985)). Second, the Supreme Court held in *Ex parte Young* that the Eleventh Amendment does not bar suits for prospective injunctive relief against state officials to prevent violations of federal law so long as the official has "some connection with the enforcement of that act." 209 U.S. 123, 157 (1908). There is no dispute that Plaintiffs name the State Defendants in their official capacity, seek only prospective injunctive relief, and do not name the State of Arkansas as a party to their suit.

The State Defendants contend *Ex parte Young* does not apply here because, as they interpret § 3 of the VRA, only "the Attorney General or an aggrieved person" may sue to enforce the VRA's protections. They point to *Seminole Tribe of Florida v. Florida*, where the Supreme Court explained that "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*." 517 U.S. 44, 74 (1996). Applying this test, the Supreme Court held that the Indian Gaming Regulatory Act could not be enforced by a private plaintiff in a suit under *Ex parte Young*. *Id.*

The State Defendants further contend they are immune from suit because "any federal enforcement authority under the Fourteenth or Fifteenth Amendments would be invalid as applied to Plaintiffs' claims, meaning that there is no federal right to vindicate." (Doc. 135, p. 18). They assert that § 208 contains no explicit statement of Congress's intent to abrogate sovereign immunity, Congress failed to identify a history and pattern of discrimination against LEP voters, and the remedial legislation is not congruent and proportional to the identified harm.

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* and why the enactment of § 208 did not exceed Congress's lawmaking authority. *See* Doc. 102, pp. 12–19. The Court will not rehash that entire discussion here. In short, *Seminole Tribe* is inapposite because, unlike the "the intricate procedures set forth" by the Indian Gaming Regulatory Act, 517 U.S. at 74, the VRA does not lay out alternative sanctions or procedures that would be circumvented by enforcement under *Ex parte Young*. Nothing about permitting judicial proceedings to go forward undermines the effectiveness of any other portion of the VRA. Thus, the methods of enforcement contained in the VRA do not supplant officer suits under *Ex parte Young*.

As to Congress's authority to enact § 208, longstanding precedent is clear that the VRA was passed pursuant to Congress's authority under both the Fourteenth and

Fifteenth Amendments. *E.g.*, *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 126–27 (1978) (noting that the VRA "is designed to implement the Fifteenth Amendment and, in some respects, the Fourteenth Amendment") (citing *Katzenbach v. Morgan*, 384 U.S. 641 (1966) and *South Carolina v. Katzenbach*, 383 U.S. 301 (1966)); *City of Boerne v. Flores*, 521 U.S. 507, 518 (1997) (explaining that "measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments"). The enactment of § 208 was congruent and proportional to remedy Congress's finding that individuals who require assistance to vote were being denied their full voting rights.

The VRA, including § 208, was "passed pursuant to its Fifteenth Amendment enforcement power" and "validly abrogated state sovereign immunity. The immunity from suit that [the state] and its officials otherwise enjoy in federal court offers it no shield here." *OCA-Greater Houston*, 867 F.3d at 614 (citations omitted).

E. Preemption

Having cleared the procedural underbrush, the Court addresses the merits of Plaintiffs' claim: do the challenged provisions of the Arkansas Code conflict with § 208 of the VRA so as to render them preempted and unenforceable? As to the six-voter limit, the answer is yes. As to the requirement that poll workers keep a list of each voter assistor, the answer is no.

Appendix C

The Supremacy Clause of the United States Constitution provides that "the Laws of the United States . . . shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. Accordingly, the Supreme Court has "long recognized that state laws that conflict with federal law are 'without effect.'" *Altria Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). This is known as preemption.

A federal statute can explicitly or—as is alleged here—implicitly preempt state law. Implied preemption occurs "where congressional intent to supersede state law may be inferred." *Pet Quarters, Inc. v. Depository Tr. & Clearing Corp.*, 559 F.3d 772, 780 (8th Cir. 2009). The form of implied preemption implicated here is conflict preemption. "Conflict preemption exists where a party's compliance with both federal and state law would be impossible or where state law would pose an obstacle to the accomplishment of congressional objectives." *Id.* (citing *Whistler Invs., Inc. v. Depository Tr. & Clearing Corp.*, 539 F.3d 1159, 1166 (9th Cir. 2008)). "There is a presumption against preemption in areas of traditional state regulation, [which] is overcome if it was the clear and manifest purpose of [Congress] to supersede state authority." *Wuebker v. Wilbur-Ellis Co.*, 418 F.3d 883, 887 (8th Cir. 2005) (internal quotation marks omitted).

3. The Six-Voter Limit at § 7-5-310(b)(4)(B) is Preempted by § 208

The six-voter limit in § 7-5-310(b)(4)(B) of the Arkansas Code conflicts with § 208 of the VRA and is preempted. 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 assistor of their choice.

The six-voter limit is therefore more restrictive than § 208 and makes "compliance with both . . . impossible." *Pet Quarters*, 559 F.3d at 780 (citing *Whistler Invs.*, 539 F.3d at 1166). If a voter complies with § 208 and selects the assistor of their choice, that assistor could violate Arkansas law and be subject to civil and criminal penalties. The Fifth Circuit, in holding that Texas's limitation on who could serve as a translator similarly conflicted with § 208, explained that "a state cannot restrict this federally guaranteed right by enacting a statute tracking its language, then defining terms more restrictively than as federally defined." *OCA-Greater Houston*, 867 F.3d at 615; *see Disability Rts. N.C v. N.C. State Bd. of Elections*, 2022 WL 2678884, at *5 (E.D.N.C. July 11, 2022) ("The plain language of North Carolina's provisions impermissibly narrows a Section 208 voter's choice of assistant from the federally authorized right to 'a person of the voter's choice' to 'the voter's near relative or verifiable legal guardian.'"). Here, Arkansas essentially adds a new clause to the end of § 208:

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> 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, *so long as that person has assisted fewer than six other voters during the election*.

This addition "impermissibly narrows the right guaranteed by Section 208." *Id.*

The six-voter limit in § 7-5-310(b)(4)(B) also poses an obstacle to Congress's clear purpose to allow the voter to decide who assists them at the polls. With the exception of the voter's employer or union representative, Congress wrote § 208 to allow voters to choose any assistor they want. The Senate Report explained this broad protection was necessary to prevent discrimination against voters who require assistance because "many such voters may feel apprehensive about casting a ballot in the presence of, or may be misled by, someone other than a person of their own choice." S. Rep. No. 97-417, at 62 (1982). The Supreme Court has "explained that where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Hillman v. Maretta*, 569 U.S. 483, 496 (2013) (cleaned up). Arkansas has determined that voters should only get the assistor of their choice up to a point, but there is no evidence Congress contemplated this numerical restriction on the right provided by § 208.

The State Defendants contend the six-voter limit only presents an obstacle to § 208 in a "far-fetched" and "implausible situation where more than six voters chose one-and-the-same person to be their only trusted assistant." (Doc. 135, p. 25). That scenario is far from "implausible." Take, for example, a family where a teenage child is fluent in English, but her parents, older siblings, and grandparents are not. Those family members may all wish to have the English-speaking child translate their voting materials for them. But some of the family members would be thwarted by the six-voter limit. Or, in a hypothetical based in the facts of this case: Aracelia Gonzalez translated for six voters by the early evening on Election Day 2020. At that point, had a family member, friend, or Arkansas United member who trusted Ms. Gonzalez asked for her help to vote, she would be forced to refuse out of fear of civil and criminal sanctions. A similar scenario could play out for voters who require assistance due to blindness or other disability.

The State Defendants further contend the six-voter limit is not preempted because it serves Arkansas's compelling interests in election integrity, fighting voter fraud, and easing burdens on poll workers.[14] The State

14. The State Defendants aver that nefarious voter assistors would influence "busloads of people" to vote fraudulently without the six-vote limit in place. (Doc. 135, p. 7). It is unclear why, if the would-be fraudsters were sufficiently motivated to organize busloads of voters to bring to the polls, they could not also bring some confederate assistors along to circumvent the six-voter limit. The State Defendants were also unable to cite any instances of voter fraud related to translation assistance. Regardless, because the

Defendants fail to cite any authority carving out an exception to the Supremacy Clause when a state has a compelling interest in enacting a statute that conflicts with federal law. The preemption inquiry is driven by "congressional purpose," not the purpose of the state legislature. *In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Pracs. Litig.*, 621 F.3d 781, 791 (8th Cir. 2010).

The State Defendants also point to the legislative history of § 208. The discussion of § 208 in the Senate Report addresses the issue of state legislation as follows:

> The Committee intends that voter assistance procedures, including measures to assure privacy for the voter and the secrecy of his vote be established in a manner which encourages greater participation in our electoral process. The Committee recognizes 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.
>
> State provisions would be preempted only to the extent that they unduly burden the right recognized in this section, with that determination being a practical one dependent upon the facts. Thus, for example, a procedure could not deny the assistance at some stages

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State's "compelling interests" are not the focus of the preemption inquiry, these issues are immaterial to the Court's analysis.

> of the voting process during which assistance was needed, nor could it provide that a person could be denied assistance solely because he could read or write his own name.
>
> By including the blind, disabled, and persons unable to read or write under this provision, the Committee does not require that each group of individuals be treated identically for purposes of voter assistance procedures. States, for example, might have reason to authorize different kinds of assistance for the blind as opposed to the illiterate. The Committee has simply concluded that, at the least, members of each group are entitled to assistance from a person of their own choice.

S. Rep. No. 97-417, at 62–63 (1982).

The State Defendants latch onto this "undue burden" language and argue the right to choose an assistor protected by § 208 does not extend to *any* person of the voter's choosing—the state may place additional restrictions on the choice of assistor so long as the restrictions are not an undue burden.[15]

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15. The State Defendants point to *Ray v. Texas*, where the district court found that "Section 208 allows the voter to choose a person who will assist the voter, but it does not grant the voter the right to make that choice without limitation." 2008 WL 3457021, at *7 (E.D. Tex. Aug. 7, 2008). However, *Ray* pre-dates *OCA-Greater Houston*, where the Fifth Circuit adopted a broader view of § 208's protections.

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The language of the Senate Report suggests that some state legislation on the topic of voter assistance is permissible but does not extend as far at the State Defendants suggest. Directly after recognizing that states may legislate in this area, the Senate Report states that "at the least, members of each group are entitled to assistance from a person of their own choice." *Id.* at 63. In other words, the one thing states cannot do is disallow voters the assistor of their choice—precisely what the six-voter limit does.

The State Defendants argue this is an absurd result because a voter's unfettered discretion in choosing their assistor would allow them to select even an incarcerated person. But a common-sense reading of § 208 suggests that any assistor chosen by a voter must be *willing* and *able* to assist. If a chosen person declines to assist the voter or simply does not show up at the polling place, that person has not violated § 208. And an incarcerated person would not be able assist at the polling place for reasons that are completely unrelated to Arkansas's elections laws.

The State Defendants further argue the six-voter limit is not an undue burden because it "did not prevent Reith or Arkansas United from assisting *any* identifiable person." (Doc. 149, p. 9). This argument is immaterial because Plaintiffs' contend—and the Court agrees—that the six-voter limit *facially* conflicts with § 208. This argument also misstates the facts—Ms. Gonzalez reached the six-voter limit on Election Day and therefore *could not* assist any additional voters. The record is clear that there were LEP voters that Ms. Gonzalez could have assisted absent the six-voter limit.

Having found the six-voter limit impermissibly conflicts with federal law, the Court necessarily finds that the criminal provisions at Arkansas Code Arkansas Code § 7-1-103(a)(19)(C) and (b)(1), which make it a Class A misdemeanor to assist a voter "except as provided in § 7-5-310," are similarly preempted to the extent they are used to enforce criminal penalties against any person assisting more than six voters.

4. The Tracking Requirement at § 7-5-310(b)(5) is Not Preempted by § 208

While the six-voter limit is preempted by § 208 of the VRA, the same is not true of Arkansas's corresponding assistor-tracking provision. Section 7-5-310(b)(5) of the Arkansas Code provides: "It shall be the duty of the poll workers at the polling site to make and maintain a list of the names and addresses of all persons assisting voters." Unlike the six-voter limit, this tracking requirement does not prevent any voter from selecting the assistor of their choice. Therefore, while the tracking requirement addresses the same topic as § 208, the two statutes can "operate harmoniously." *Craig v. Simon*, 978 F.3d 1043, 1049 (8th Cir. 2020) (quoting *Gonzalez v. Arizona*, 677 F.3d 383, 398 (9th Cir. 2012)). The tracking requirement is the type of permissible state legislation contemplated by the legislative history to § 208.

CONCLUSION

For the reasons stated, the County and State Defendants' Motions for Summary Judgment (Docs. 131

& 134) are **DENIED**, and Plaintiffs' Motion for Summary Judgment (Doc. 137) is **GRANTED IN PART AND DENIED IN PART**.

The six-voter limit at § 7-5-310(b)(4)(B) of the Arkansas Code is **DECLARED** to be preempted by § 208 of the VRA. Sections 7-1-103(a)(19)(C) and 7-1-103(b)(1) of the Arkansas Code are also **DECLARED** to be preempted by § 208 to the extent they are used to enforce criminal penalties for violations of § 7-5-310(b)(4)(B). The Court hereby **PERMANENTLY ENJOINS** the State and County Defendants, their employees, agents, and successors in office, and all persons acting in concert with them, from enforcing § 7-5-310(b)(4)(B), or otherwise engaging in any practice that limits the right secured by § 208 of the Voting Rights Act based on the number of voters any individual has assisted, and from enforcing §§ 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). The State and County Defendants are **ORDERED** to inform their staff to cease enforcement of § 7-5-310(b)(4)(B) in advance of the 2022 General Election, and the members of the State Board of Election Commissioners are **FURTHER ORDERED** to send a memorandum to all county election boards in Arkansas setting forth the Court's rulings, including that the six-voter limit has been declared invalid under federal law, **no later than September 16, 2022**. Any Defendant that intends to use the Assisted Voter Card or equivalent document to track voter assistors in future elections is **ORDERED** to remove from that document any reference to the six-voter limit at § 7-5-310(b)(4)(B). In all future

elections after the 2022 General Election, Defendants are **ORDERED** to update all trainings, manuals, websites, and any materials given to voters or voter assistors to remove any reference to the six-voter limit at § 7-5-310(b)(4)(B).[16]

An amended Judgment will enter contemporaneously with this opinion.

IT IS SO ORDERED on this 7th day of September, 2022.

/s/ Timothy L. Brooks
TIMOTHY L. BROOKS
UNITED STATES
DISTRICT JUDGE

16. The Court recognizes Defendants may have already produced training materials and/or conducted trainings in advance of the 2022 General Election. Mindful that federal courts must be cautious in burdening state election officials in the run-up to an election, *see Purcell v. Gonzalez*, 549 U.S. 1 (2006), the Court does not expect Defendants to conduct updated formal trainings or produce an updated training manual before the 2022 General Election (although they may certainly choose to do so). For the 2022 General Election, Defendants must simply inform their employees and volunteers to not enforce the six-voter limit, update the text on the Assisted Voter Card if they use it, and the State Board must send a memorandum to all county election boards. Because the six-voter limit is not a voter-facing policy and its primary front-end enforcement mechanisms are the tracking requirement—which may stay in place—and the text on the Assisted Voter Card, the Court finds no cause for concern that election officials or voters will be confused by the Court's enjoinment of the six-voter limit.

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF ARKANSAS, FAYETTEVILLE DIVISION, FILED FEBRUARY 5, 2021

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF ARKANSAS
FAYETTEVILLE DIVISION

CASE NO. 5:20-CV-5193

ARKANSAS UNITED AND
L. MIREYA REITH,

Plaintiffs

v.

JOHN THURSTON, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF STATE OF ARKANSAS; 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; RENEE OELSCHLAEGER, BILL ACKERMAN, MAX DEITCHLER, AND JENNIFER PRICE, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE WASHINGTON COUNTY ELECTION COMMISSION; RUSSELL ANZALONE, ROBBYN TUMEY, AND HARLAN STEE, IN THEIR

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OFFICIAL CAPACITIES AS MEMBERS OF THE BENTON COUNTY ELECTION COMMISSION; DAVID DAMRON, LUIS ANDRADE, AND LEE WEBB, IN THEIR OFFICIAL CAPACITIES AS MEMBERS OF THE SEBASTIAN COUNTY ELECTION COMMISSION; AND MEGHAN HASSLER, IN HER OFFICIAL CAPACITY AS ELECTION COORDINATOR FOR THE SEBASTIAN COUNTY ELECTION COMMISSION,

Defendants.

Filed February 5, 2021

MEMORANDUM OPINION AND ORDER

There are three motions currently before the Court. Defendants David Damron, Luis Andrade, Lee Webb, and Meghan Hassler filed a Motion to Dismiss and Memorandum Brief in Support (Docs. 82 & 83). Another Motion to Dismiss and Memorandum Brief in Support were filed by Defendants Russell Anzalone, Robbyn Tumey, and Harlan Stee (Docs. 84 & 85). Finally, Defendants John Thurston, Sharon Brooks, Bilenda Harris-Ritter, William Luther, Charles Roberts, James Sharp, and J. Harmon Smith filed a Motion to Dismiss or Alternatively to Stay Discovery and Certify Interlocutory Appeal and a Memorandum Brief in Support (Docs. 86 & 87). Plaintiffs filed a Response in Opposition to each Motion (Docs. 95, 96 & 97, respectively). For the reasons discussed below, all three Motions (Docs. 82, 84 & 86) are **DENIED**.

Appendix D

I. BACKGROUND

The Plaintiffs are Arkansas United, a non-profit organization located in Springdale, Arkansas, and L. Mireya Reith, the founder and executive director of the organization. Arkansas United advocates for immigrant populations in the state through education about the voting process and by assisting those voters who are limited in their English proficiency to read, mark, and cast their ballots at polling places. Arkansas United was founded in 2010 and is funded by hundreds of members who pay dues to support the organization's mission. The Defendants, all of whom are sued in their official capacities, can be divided into four groups. The first group, to which the Court will refer as the State Defendants, includes the Secretary of State of Arkansas—John Thurston—and the members of the Arkansas State Board of Election Commissioners—Sharon Brooks, Bilenda Harris-Ritter, William Luther, Charles Roberts, James Sharp, and J. Harmon Smith. Another group is comprised of Renee Oelschlaeger, Bill Ackerman, Max Deitchler, and Jennifer Price, who are all members of the Washington County Election Commission and to whom the Court will refer as the Washington County Defendants. The members of the Benton County Election Commission—Russell Anzalone, Robbyn Tumey, and Harlan Stee—will similarly be referred to as the Benton County Defendants. Finally, David Damron, Luis Andrade, and Lee Webb are members of the Sebastian County Election Commission, and Meghan Hassler is the Sebastian County Election Coordinator. Together, these individuals will be referred to as the Sebastian County Defendants.

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Plaintiffs first filed the original complaint in this matter and a motion for temporary restraining order on the night before Election Day in 2020. This Court issued a Memorandum Opinion and Order finding that Plaintiffs had demonstrated a likelihood of success on the merits but nevertheless denying the motion because Election Day voting was already in progress and the balance of the equities dictated against modifying the rules by which voting was being administered half-way through the day. *See* Doc. 35. Defendants then filed motions to dismiss, which became moot when Plaintiffs filed the operative Amended Complaint. Benton and Sebastian County Defendants and State Defendants each filed Motions to Dismiss the Amended Complaint.

Plaintiffs seek declaratory judgment that Sections 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 Code violate the Supremacy Clause of the Constitution and are preempted by Section 208 of the Voting Rights Act ("VRA"). Plaintiffs also seek an injunction prohibiting enforcement of those state-law provisions and directing Defendants to implement a remedial plan to ensure that voters with limited English proficiency are permitted to receive assistance from an individual of their choice when voting in future elections.

Under Arkansas Code § 7-1-103(a)(19)(C) and (b)(1), a person who assists a voter "in marking and casting the voter's ballot except as provided in § 7-5-310" is potentially subject to criminal misdemeanor penalties. While Section 7-5-310(4)(A)(i) provides that the voter may be assisted by a person of his or her choice, Section 7-5-310(b)(4)(B)

adds the restriction that "[n]o person other than [poll workers] shall assist more than six (6) voters in marking and casting a ballot at an election[.]" Section 7-5-310(b)(5) further provides that "[i]t shall be the duty of the poll workers at the polling site to make and maintain a list of the names and addresses of all persons assisting voters." Plaintiffs argue that this six-voter limit on assistance under Arkansas law, enforceable by criminal misdemeanor penalties, violates Section 208 of the VRA, which provides that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508.[1]

Sebastian County, Benton County, and State Defendants have each filed Motions to Dismiss the Amended Complaint. The Sebastian and Benton County Defendants' Motions are substantively identical, and the Court will take up those Motions together before turning to the arguments made by State Defendants.

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1. The Court notes that Arkansas Code § 7-5-310 is titled "Privacy—Assistance to voters with disabilities" and by its plain language does not appear to apply to voters who are entitled to assistance because of their limited proficiency in English. However, no Defendant suggests that Plaintiffs' claims are moot because the six-voter limit does not apply to Spanish-speaking voters with limited English proficiency. Quite the opposite, in fact—State Defendants vigorously defend the constitutionality of the six-voter limit in this context. Therefore, the Court concludes that the issue before it is in fact a live case or controversy as required by Article III of the Constitution.

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II. BENTON AND SEBASTIAN COUNTY DEFENDANTS' MOTIONS TO DISMISS

A. Service of Process is Sufficient

First, Benton and Sebastian County Defendants assert that the Amended Complaint should be dismissed for insufficient process or service of process pursuant to Rule 12(b)(4) and/or (5) of the Federal Rules of Civil Procedure. Since the County Defendants' objection is to the service itself, not the form of process or content of the summons, the Motions are properly brought under Rule 12(b)(5) rather than Rule 12(b)(4). "In a Rule 12(b)(5) motion, the party making the service has the burden of demonstrating validity when an objection to the service is made." *Roberts v. USCC Payroll Corp.*, 2009 WL 88563, at *1 (N.D. Iowa Jan. 13, 2009) (internal quotation marks omitted). Rule 4 lays out the requirements for proper service of process. Rule 4(e)(2) provides that an individual may be served by delivering a copy of the summons and the complaint to the individual, to an appropriate person at the individual's residence, or to the individual's authorized agent. Rule 4(m) requires that a defendant be served within ninety days after the complaint is filed or seek an extension of time from the court.

Plaintiffs initially attempted service for all Benton County Defendants by serving "Kim Denison as Election Coordinator," *see* Docs. 46-48, and for all Sebastian County Defendants by serving "Dan Shue as Prosecuting Attorney." *See* Docs. 53-56. Benton and Sebastian County Defendants object to this as insufficient because neither

Kim Denison nor Dan Shue is an authorized agent of the various County Defendants to accept service on their behalf. However, it appears from a review of the docket that each of the Benton and Sebastian County Defendants was subsequently served individually. *See* Docs. 70-73 & 92-94. None of the County Defendants make any argument challenging those proofs of service, which were all delivered within ninety days after the filing of the complaint, as required by Rule 4(m). Therefore, the Court concludes that service of process is sufficient as to each of the Benton and Sebastian County Defendants.

B. The Amended Complaint Adequately States a Claim

Next, Benton and Sebastian County Defendants seek dismissal of the Amended Complaint for failure to state a claim pursuant to Rule 12(b)(6). In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the Court must "accept as true all facts pleaded by the non-moving party and grant all reasonable inferences from the pleadings in favor of the nonmoving party." *Gallagher v. City of Clayton*, 699 F.3d 1013, 1016 (8th Cir. 2012) (quotation marks omitted). "[A] complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (quotation marks omitted). The alleged facts must be specific enough "to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). Pleadings that contain mere "labels and conclusions" or "a formulaic recitation of the elements of the cause of action

will not do." *Id.* A court is not required to "blindly accept the legal conclusions drawn by the pleader from the facts." *Westcott v. City of Omaha*, 901 F.2d 1486, 1488 (8th Cir. 1990).

Benton and Sebastian County Defendants argue that they can only be liable in their official capacities for unconstitutional acts that implement a policy or custom, not for simply performing a ministerial duty pursuant to an allegedly unconstitutional state law. In response, Plaintiffs point out that the cases relied upon by Benton and Sebastian County Defendants are specific to suits brought pursuant to 42 U.S.C. § 1983 and the "policy or custom" requirement does not apply to Plaintiffs' claims under the VRA.

The Court agrees with Plaintiffs. Each of the cases cited by Benton and Sebastian County Defendants addresses municipal liability under § 1983. No aspect of any of these cases suggests that the requirements for municipal liability are applicable out-side the context of § 1983. *See Does v. Wash. Cnty.*, 150 F.3d 920, 922 (8th Cir. 1998); *Bd. of Cnty. Comm'rs of Bryan Cnty. v. Brown*, 520 U.S. 397, 400, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997); *Jane Doe v. Special Sch. Dist. of St. Louis Cnty.*, 901 F.2d 642 (8th Cir. 1990).

Instead, the Court finds *281 Care Committee v. Arneson*, 638 F.3d 621 (8th Cir. 2011), to be much more instructive here, where Plaintiffs seek only prospective relief from the enforcement of an allegedly unconstitutional state law. The plaintiffs in *281 Care Committee* challenged

as unconstitutional a Minnesota statute that prohibited communications about a ballot initiative that were knowingly false or communicated with reckless disregard for their falsity. The statute was first enforceable through a civil complaint to an administrative office. County attorneys had the discretion to decide whether to bring criminal charges once the civil process was complete. In reversing the lower court and holding that the plaintiffs' injury was redressable and that they had standing to challenge the state law, the Eighth Circuit noted that

> [w]hen a statute is challenged as unconstitutional, the proper defendants are the officials whose role it is to administer and enforce the statute. The county attorneys are the parties primarily responsible for enforcing the criminal portion of the statute; enjoining them would redress a discrete portion of plaintiffs' alleged injury in fact.

Id. at 631 (internal citation omitted). If an injunction against the county attorneys would provide at least partial redress to the alleged injury, it stands to reason that they are appropriate defendants for such a suit.

In the Amended Complaint, Plaintiffs allege that Russell Anzalone, Robbyn Tumey, and Harlan Stee, as members of the Benton County Election Commission, and David Damron, Luis Andrade, and Lee Webb, as members of the Sebastian County Election Commission, may review the list of persons who assisted voters at polling locations in their respective counties and refer individuals to the

county attorney for possible criminal prosecution. *See* Doc. 79, ¶¶ 16 & 17. The Amended Complaint further alleges that Meghan Hassler, as the Sebastian County Election Coordinator, "carries out election administration duties . . . including enforcing the voter assistance provisions challenged by Plaintiffs." (Doc. 79, ¶ 18). These allegations are sufficient at this stage of litigation to make a plausible claim against each of the Benton and Sebastian County Defendants.

Finally, Benton and Sebastian County Defendants seek to adopt the substantive arguments made by State Defendants in the motion to dismiss and brief in support filed in response to the original complaint (Docs. 62 & 63). That motion was mooted by Plaintiffs' Amended Complaint, but State Defendants have renewed many of their arguments in their Motion to Dismiss the Amended Complaint (Doc. 86), which the Court will take up below.

III. STATE DEFENDANTS' MOTION TO DISMISS

State Defendants offer many reasons why the Amended Complaint must be dismissed. All of them are without merit. First, the Court will take up State Defendants' challenges to this Court's jurisdiction under Rule 12(b)(1)—state sovereign immunity and Plaintiffs' lack of standing. Concluding that it has jurisdiction, the Court will then consider under Rule 12(b)(7) whether Plaintiffs failed to join necessary parties before turning to the challenges State Defendants make to the merits of Plaintiffs' claims under Rule 12(b)(6). Finally, the Court will address the argument that Plaintiffs' claims are barred by laches.

Appendix D

A. State Defendants Are Not Immune From Suit

The Court first turns to State Defendants' assertion that state sovereign immunity bars Plaintiffs' claims. Federal courts are courts of limited jurisdiction, and Rule 12(b)(1) permits a defendant to move to dismiss claims over which the court lacks subject-matter jurisdiction. State sovereign immunity, as enshrined in the Eleventh Amendment and interpreted by the Supreme Court in *Hans v. Louisiana*, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), prevents a federal court from hearing a suit against a state by a citizen of that state. There are a handful of exceptions to state sovereign immunity, two of which are relevant to the instant case. First, Congress may abrogate state sovereign immunity when it acts pursuant to its enforcement power under Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment, so long as its intention to do so is "unmistakably clear in the language of the statute." *Dellmuth v. Muth*, 491 U.S. 223, 228, 109 S.Ct. 2397, 105 L.Ed.2d 181 (1989) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985)). Second, the Supreme Court held in *Ex parte Young* that the Eleventh Amendment does not bar suits for prospective injunctive relief against state officials to prevent violations of federal law so long as the official has "some connection with the enforcement of that act." 209 U.S. 123, 157, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

State Defendants argue that neither of these exceptions to state sovereign immunity apply in this case. First, State Defendants urge the Court to hold that Section 208 does

not protect voters with limited English proficiency. To find otherwise, State Defendants argue, would force the Court to conclude that the provision is unconstitutional because the Fifteenth Amendment empowers Congress to pass legislation to protect voters from discrimination only on the basis of race, not proficiency in English. Section 208 as Plaintiffs interpret it would therefore exceed the scope of Congress's enforcement power. Second, State Defendants argue that Section 208 does not meet the standards that have emerged from the case law to validly abrogate state sovereign immunity. They assert that there is no explicit statement of Congress's intent to abrogate sovereign immunity, that Congress failed to identify a history and pattern of discrimination against voters with limited English proficiency, and that the remedial legislation is not congruent and proportional to the identified harm. According to State Defendants, this means that the *Ex parte Young* exception to sovereign immunity is also inapplicable: If Section 208 cannot validly protect voters with limited English proficiency, then there is no violation of federal law for which to seek prospective relief against State Defendants. Finally, State Defendants argue that even if the Court accepts Plaintiffs' interpretation of Section 208, sovereign immunity still bars their suit. The *Ex parte Young* exception for officer suits does not apply, State Defendants argue, where the statute provides an alternative remedial framework, nor do the individual State Defendants have a sufficient connection with the enforcement of the six-voter limit.

Since Plaintiffs name State Defendants in their official capacity, seek only prospective injunctive relief,

and do not name the State of Arkansas as a party to their suit, the Court will first consider whether the exception to sovereign immunity provided in *Ex parte Young* is applicable in this case. Concluding that it is, the Court does not take up the issue of whether the VRA also abrogates state sovereign immunity.

1. Section 208 Covers Voters with Limited English Proficiency

The first question is whether Congress intended for voters with limited English proficiency to be protected by Section 208. The Court concludes that it did. Section 208 provides that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508. The plain language of the statute encompasses voters who cannot read or write in English because of their limited English proficiency. Nothing about the statutory text suggests that the "inability" cannot be due to a lack of education rather than a disability, or that the provision does not apply to voters who can read or write in a language other than English. Neither State Defendants' emphasis on the use of the term "illiterate persons" in the provision's title nor on the absence of the term "limited-English-proficient" in the statute persuades the Court to add its own gloss to the plain language of Section 208.

Nor is this a novel interpretation of Section 208. District courts across the country have entered consent decrees

between the Justice Department and municipalities that have violated Section 208 with regard to foreign-language speakers with limited proficiency in English. *See* Consent Decree, Judgment, and Order, *United States v. Fort Bend Cnty.*, No. 4:09-cv-01058 (S.D. Tex. Apr. 13, 2009) (requiring county to allow Spanish-speaking voters with limited English proficiency to be assisted by the person of their choice pursuant to Section 208); Memorandum of Agreement, *United States v. Kane Cnty.*, No. 07 C 5451 (N.D. Ill. Nov. 7, 2007) (same); Consent Decree, Judgment, and Order, *United States v. Brazos Cnty.*, No. H-06-2165 (S.D. Tex. June 29, 2006) (same); Consent Decree, *United States v. Orange Cnty.*, No. 6:02-cv-737-ORL-22JGG (M.D. Fla. Oct. 8, 2002) (same); Settlement Agreement, *United States v. City of Philadelphia*, No. 2:06cv4592 (E.D. Pa. June 4, 2007) (requiring city to allow limited-English-proficient Spanish-speaking voters to be assisted by the person of their choice pursuant to Section 208); Revised Agreed Settlement Order, *United States v. City of Springfield*, No. 06-301-23-MAP (D. Mass. Sept. 15, 2006) (same).

Courts have also upheld challenges by individuals and organizations asserting that Section 208 extends to voters with limited English proficiency. *See Priorities USA v. Nessel*, 462 F. Supp. 3d 792, 816 (E.D. Mich. 2020) (finding the plaintiffs adequately pleaded their claim that Section 208 preempted a state law placing additional restrictions on who could assist a voter with limited English proficiency); *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017) (affirming summary judgment in favor of plaintiffs who alleged Section 208

preempted a state voting law that restricted the assistance limited-English-proficient voters could receive); *Nick v. Bethel*, 2008 WL 11456134 (D. Alaska Jul. 30, 2008) (granting preliminary injunction based on a finding that plaintiffs had demonstrated a likelihood of success on their claim that the state violated Section 208 when it prevented Alaska Native Yupik-speaking voters from having assistance from a person of their choosing); *United States v. Berks Cnty.*, 277 F. Supp. 2d 570 (E.D. Pa. 2003) (holding that denying Spanish-speaking voters assistance by a person of their choice violated Section 208).

The legislative history also supports the Court's conclusion from the text that Congress intended for Section 208 to cover voters who spoke other languages but struggled to read and write in English. The Senate Report discussing the addition of Section 208 to the VRA recognized that "[c]ertain discrete groups of citizens are unable to exercise their rights to vote without obtaining assistance in voting including aid within the voting booth." S. Rep. No. 417, 97th Cong., 2d Sess. at 62. These groups include "those who either do not have a written language or who are unable to read or write sufficiently well to understand the election material and the ballot." *Id.* Further underscoring that Section 208 covers voters with limited proficiency in English, the Senate Report referenced an exception to the employer limitation for "voters who must select assistance in a small community composed largely of language minorities." *Id.* at 64. Thus, it is clear that Congress intended for Section 208 to apply to voters with limited proficiency in English.

2. Section 208 Does Not Exceed Congress's Authority

Since the Court concludes that Congress intended Section 208 to cover voters with limited English proficiency, the next question is whether Section 208, thus interpreted, exceeds the scope of Congress's lawmaking authority. The Court concludes that it does not. Section 5 of the Fourteenth Amendment and Section 2 of the Fifteenth Amendment both grant Congress the authority to pass legislation to protect the rights guaranteed by those amendments. The Supreme Court has long recognized that the VRA was enacted pursuant to Congress's authority under both the Fourteenth and Fifteenth Amendments. *E.g.*, *United States v. Bd. of Comm'rs of Sheffield*, 435 U.S. 110, 126-27, 98 S.Ct. 965, 55 L.Ed.2d 148 (1978) (noting that the VRA "is designed to implement the Fifteenth Amendment and, in some respects, the Fourteenth Amendment") (citing *Katzenbach v. Morgan*, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966) and *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966)); *City of Boerne v. Flores*, 521 U.S. 507, 518, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (" . . . measures protecting voting rights are within Congress' power to enforce the Fourteenth and Fifteenth Amendments. . . .").

The Equal Protection Clause in Section 1 of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." Section 5 provides that "Congress shall have the power to enforce this article by appropriate legislation." Despite the broad scope of the Equal

Protection Clause, however, Congress's enforcement power is not without limit. In *City of Boerne*, the Supreme Court acknowledged that "[l]egislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into `legislative spheres of autonomy previously reserved to the States.'" 521 U.S. at 518, 117 S.Ct. 2157 (quoting *Fitzpatrick v. Bitzer*, 427 U.S. 445, 455, 96 S.Ct. 2666, 49 L.Ed.2d 614 (1976)). "Congress' power under § 5, however, extends only to `enforcing' the provision of the Fourteenth Amendment. The Court has described this power as `remedial.'" *Id.* at 519, 117 S.Ct. 2157 (quoting *South Carolina v. Katzenbach*, 383 U.S. at 326, 86 S.Ct. 803) (modification adopted). "Congress has been given the power `to enforce,' not the power to determine what constitutes a constitutional violation." *Id.* "There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 520, 117 S.Ct. 2157. "The appropriateness of remedial measures must be considered in light of the evil presented." *Id.* at 530, 117 S.Ct. 2157. An appropriate remedial measure must be "understood as responsive to, or designed to prevent, unconstitutional behavior." *Id.* at 532, 117 S.Ct. 2157.

State Defendants argue that Section 208 exceeds Congress's power to enforce the Fifteenth Amendment. Because Section 1 of that amendment speaks only of race and not of language ability, State Defendants argue, including voters with limited English proficiency within the scope of Section 208 exceeds Congress's power under Section 2. Further, State Defendants argue that because

the legislative record for Section 208 does not identify a history and pattern of violations of the voting rights of voters with limited English proficiency, Section 208 cannot be considered a congruent and proportional remedy. Both of these arguments miss the mark by inappropriately narrowing the scope of the Court's inquiry.

First, as noted above, the Supreme Court has held that both the Fourteenth and Fifteenth Amendments authorize legislation protecting voting rights, including the VRA. In *Katzenbach v. Morgan*, for example, the Supreme Court upheld Section 4(e) of the VRA as enacted in 1965. Section 4(e) prohibited states from denying the right to vote to "persons educated in American-flag schools in which the predominant classroom language was other than English" based on an inability to read or write in English. The Supreme Court held that Section 4(e) was a valid enactment under the Enforcement Clause of the Fourteenth Amendment that preempted a New York state law that required English literacy to vote. *Id.* at 652, 86 S.Ct. 1717. The Court agreed that Congress was within the scope of its authority under the Fourteenth Amendment when it determined that the English literacy requirement was intended to deny the right to vote to certain citizens and "constituted an invidious discrimination in violation of the Equal Protection Clause." *Id.* at 656, 86 S.Ct. 1717. Thus, the Court concludes that even if the Fifteenth Amendment is focused on discrimination on the basis of race, the Fourteenth Amendment empowers Congress to pass legislation that prevents citizens with limited proficiency in English from being denied their right to cast a meaningful vote.

Second, the Court is persuaded that Section 208 is congruent and proportional to an identified constitutional violation and does not impermissibly expand the scope of the Equal Protection Clause. The Court does not agree with State Defendants that it is constrained to look only at Section 208 to determine whether the "legislative record contains . . . findings of violations of the rights" of language minorities. Read as a whole, the VRA evinces a clear concern for the voting rights of citizens with limited English proficiency. In one section of the VRA, Congress made the finding "that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens . . . have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language." 52 U.S.C. § 10301(f)(1). In another section, Congress found that "citizens of language minorities have been effectively excluded from participation in the electoral process" and that "the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them resulting in high illiteracy and low voting participation." 52 U.S.C. § 10503(a). While these findings appear in other sections of the VRA that lay out more expansive requirements for states in areas with higher concentrations of language-minority voters, the same findings support the less intrusive requirement of Section 208. And in light of Congress's findings regarding the obstacles faced by voters with limited English proficiency, the Court finds that permitting such voters to have an assistor of their choice is a congruent and proportional remedy to enforce the guarantees of

the Equal Protection Clause and does not impermissibly create a new constitutional violation not contemplated by the Fourteenth Amendment. As the Senate Report makes clear, Section 208 "does not create a new right . . . to receive assistance; rather it implements an existing right by prescribing minimal requirements as to the manner in which voters may choose to receive assistance." S. Rep. No. 417, 97th Cong., 2d Sess. at 63. This was necessary to effect the nationwide prohibition of literacy tests—if a person who cannot read in English is permitted to vote, she must be permitted to have assistance at the polls or her right to vote is meaningless. *See id.*

3. The VRA's Remedial Scheme does not Preclude Officer Suits

Having determined that Section 208 is a valid federal law as applied to voters with limited English proficiency, which might otherwise be enforceable through a suit against the appropriate officer, the Court now turns to State Defendants' argument that the VRA contains a "detailed enforcement mechanism" that supplants officer suits pursuant to *Ex parte Young.* State Defendants argue that 52 U.S.C. § 10308(d), which provides for civil action by the Attorney General to seek injunctive relief, supplants officer suits pursuant to *Ex parte Young* to enforce the VRA. However, State Defendants ignore entirely that 52 U.S.C. § 10302 clearly contemplates "proceeding[s] instituted by . . . an aggrieved person under any statute to enforce the voting guarantees of the four-teenth or fifteenth amendment." This language explicitly creates a private right of action to enforce the VRA, and the Court

cannot render that language meaningless when § 10302 and § 10308(d) can easily coexist. *See Ala. State Conf. of N.A.A.C.P. v. Alabama*, 949 F.3d 647, 651 (11th Cir. 2020) ("Originally, § 3 gave enforcement authority only to the Attorney General of the United States. . . . Congress then amended § 3 in 1975 to make what was once implied now explicit: private parties can sue to enforce the VRA.").

Seminole Tribe of Florida v. Florida, 517 U.S. 44, 116 S.Ct. 1114, 134 L.Ed.2d 252 (1996), does not suggest a different result. In *Seminole Tribe*, the Supreme Court cautioned that "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*." *Id.* at 74, 116 S.Ct. 1114. The Supreme Court emphasized "the intricate procedures set forth" by the Indian Gaming Regulatory Act ("IGRA") that "limit significantly" the state's obligations to the tribe and the potential sanctions. *Id.* For example, a state's refusal to negotiate with the tribe results in referral to a mediator and then to the Secretary of the Interior. "By contrast with this modest set of sanctions, an action brought against a state official under *Ex parte Young* would expose that official to the full remedial powers of a federal court, including, presumably, contempt sanctions." *Id.* at 75, 116 S.Ct. 1114. In conclusion, the Supreme Court observed that if the IGRA "could be enforced in a suit under *Ex parte Young* . . . it is difficult to see why an Indian tribe would suffer through the intricate [statutory] scheme." *Id.*

Here, in contrast, the VRA clearly permits both the Attorney General or "an aggrieved person" to initiate judicial proceedings to enforce the statute's requirements. It does not lay out alternative sanctions or procedures that would be circumvented by enforcement under *Ex parte Young*. Nothing about permitting judicial proceedings to go forward undermines the effectiveness of any other portion of the VRA. Thus, the Court concludes that to the extent the VRA includes other methods of enforcement, it does not supplant officer suits under *Ex parte Young*.

4. State Defendants are Appropriate Parties to an Officer Suit

Since the Court has determined that officer suits pursuant to *Ex parte Young* are an appropriate method of enforcing the VRA, the Court now takes up State Defendants' final argument: that neither the Secretary of State nor the members of the Arkansas Board of Election Commissioners are appropriate defendants in such a suit. State Defendants argue that since they do not have the authority to commence criminal proceedings against Plaintiffs for violations of the state laws they challenge, they are made parties simply as representatives of the state, which *Ex parte Young* does not permit. The Court disagrees.

In *281 Care Committee v. Arneson*, 638 F.3d 621 (8th Cir. 2011), the Eighth Circuit considered what kind of enforcement power an official must have to be an appropriate defendant in an officer suit and held that "[w]hile we do require `some connection' between

the [defendant official] and the challenged statute, that connection does not need to be primary authority to enforce the challenged law." *Id.* at 632. Here, Plaintiffs allege that the state Board of Election Commissioners "is responsible for, among other duties, providing statewide guidance and training to election officers and county election commissioners" and that the Board "issues a manual of procedures for county election commissions as well as additional training materials for election officials." (Doc. 79, ¶ 14).[2] Secretary Thurston is the chairperson of the Board and oversees the state Election Division. *See id.*

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2. The Court notes that the Arkansas Board of Election Commissioners' website, to which Plaintiffs refer in the Amended Complaint, provides answers to frequently asked questions, including the following under the heading "Voter Issues":

> Q: How is it possible to know if a person has assisted more than six (6) voters?
>
> A: A person may assist no more than six voters in an election. The poll workers can only ensure that a person does not assist any more than six (6) voters at that individual polling site through maintaining a list of the names and addresses of all persons assisting voters as required by law. After the election, the county election commission can review the List of Persons Assisting Voters from all the polling locations. If it is believed that a person may have assisted more than six (6) voters, the commission can submit that information and any evidence to the Prosecuting Attorney [A.C.A. § 7-5-310(b)(4)(B)]. Any violation is a Class A misdemeanor offense punishable by fine or confinement. [A.C.A. § 7-1-103(a)(20)(C)].

FAQs, Arkansas State Board of Election Commissioners, https://www.arkansas.gov/sbec/faqs/(last accessed Jan. 31, 2021).

at ¶ 13. In pleading that State Defendants are responsible for training the county election commissioners on their legal duties, Plaintiffs have shown a sufficient connection with the enforcement of the six-voter limit to allow them to seek relief against those officials under *Ex parte Young*. *See also Mo. Prot. & Advoc. Servs., Inc. v. Carnahan*, 499 F.3d 803, 807 (8th Cir. 2007) (holding that the Secretary of State was an appropriate defendant for purposes of *Ex parte Young* where local election officials had "broad authority" to administer elections but the Secretary was the "chief state election official" and the record reflected "apparent confusion" among local election officials about the state laws at issue).

B. Plaintiffs Have Standing

Next, the Court takes up whether Plaintiffs have standing to bring their claims. In seeking dismissal under Rule 12(b)(1), State Defendants argue that Plaintiffs lack standing for two reasons. First, State Defendants argue that Plaintiffs have not suffered an injury-in-fact because neither Plaintiff is a voter alleging she was denied protections under Section 208. Second, State Defendants argue that Plaintiffs' alleged injury is not fairly traceable to the State Defendants because they would not be the ones to bring criminal charges for violations of Arkansas Code § 7-5-310(b)(4)(B) and therefore would not be redressed by the relief sought. In response, Plaintiffs argue that they have pleaded sufficient facts to establish both associational and organizational standing. Specifically, Plaintiffs claim Arkansas United has been injured by having to divert resources as a result of the unconstitutional state law

and that their members have been injured because they were denied the right to vote with the help of an assistor of their choice. These injuries, according to Plaintiffs, are both traceable to State Defendants and redressable by a favorable decision because State Defendants play a role in the implementation and enforcement of the six-voter limit.

In a multi-plaintiff suit, only one plaintiff need satisfy the constitutional standing requirements. *See Horne v. Flores*, 557 U.S. 433, 446-47, 129 S.Ct. 2579, 174 L.Ed.2d 406 (2009). A plaintiff organization may establish standing in two ways. Where a plaintiff entity challenges an action that affects it directly, the court "conduct[s] the same inquiry as in the case of an individual." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79, 102 S.Ct. 1114, 71 L.Ed.2d 214 (1982). Thus, for organizational standing, a plaintiff entity must show that it: (1) suffered an injury-in-fact; (2) which is fairly traceable to the actions of the defendant; and (3) will likely be redressed by a favorable decision. *Lujan v. Def. of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992). An injury-in-fact is "(a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560, 112 S.Ct. 2130 (internal citations and quotation marks omitted).

"[I]n the absence of injury to itself, an association may have standing solely as the representative of its members." *Higgins Elec., Inc. v. O'Fallon Fire Prot. Dist.*, 813 F.3d 1124, 1128 (8th Cir. 2016) (quoting *Warth v. Seldin*, 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). To establish associational standing, the entity must prove

the following three elements: (1) its members would have standing to sue in their own right; (2) the suit seeks to protect interests germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977).

The Court first considers whether the pleadings support organizational standing. Concluding that they do, the Court does not take up whether Plaintiffs have also sufficiently pleaded associational standing on behalf of Arkansas United's members.

1. The Facts Pleaded Allege an Injury-in-Fact

Plaintiffs have pleaded sufficient facts to establish that Arkansas United has standing as an organization to bring suit on its own behalf. Courts have long recognized that an organization is injured when it has to divert resources from one activity to another in response to the alleged harm. *See*, *e.g.*, *Havens Realty Corp.*, 455 U.S. at 379, 102 S.Ct. 1114 (finding organizational standing where the entity alleged it had to "devote significant resources to identify and counteract" the defendant's unconstitutional actions); *cf. Nat'l Fed'n of the Blind of Mo. v. Cross*, 184 F.3d 973, 980 (8th Cir. 1999) (recognizing that a plaintiff organization could establish standing by pleading that it has been impacted in a measurable way, such as expending resources, losing members, or being prevented from carrying out a particular initiative). Here, Plaintiffs allege

that the state laws they challenge forced them to divert staff and resources from get-out-the-vote phone-banking efforts. *See* Doc. 79, ¶ 54. As a result, Arkansas United was unable to meet "the phone-banking deliverables that its funder required under the terms of its grant [and] may therefore lose future funding and have fewer paid staff to dedicate to phone banking and voter outreach in future elections." *Id.* This diversion also meant that Arkansas United "called fewer potential voters from the Arkansas immigrant and Latino community . . . to give them important information about the election and encourage them to vote" and thereby "was thwarted in achieving its mission." *Id.* at ¶ 56. Furthermore, Plaintiffs allege that Arkansas United had to expend resources to coordinate the additional staff and volunteers who had to be deployed to assist in polling places as a result of the state's limit on the number of voters an individual could assist and the risk of criminal prosecution for exceeding that limit. *Id.* at ¶ 57. These specific allegations establish that Arkansas United has alleged a measurable injury-in-fact.

Nor is the Court persuaded by State Defendants' argument that Plaintiffs' alleged injury is not the type of harm Section 208 of the VRA was intended to prevent. In *Havens Realty*, the federal statute under which the plaintiff brought suit, the Fair Housing Act ("FHA") made it unlawful for any covered person or entity "[t]o represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available . . . when such dwelling is in fact so available." 455 U.S. at 373, 102 S.Ct. 1114 (quoting 42 U.S.C. § 3604(d)). Though the plaintiff organization was not an individual seeking

housing, the Supreme Court nevertheless concluded that if the defendants' "steering practices have perceptibly impaired [the plaintiff organization's] ability to provide counseling and referral services for low-and moderate-income homeseekers, there can be no question that the organization has suffered injury in fact." *Id.* at 379, 102 S.Ct. 1114. The "concrete and demonstrable injury to the organization's activities" paired with the need to divert resources to counteract the allegedly wrongful conduct was sufficient injury to give the plaintiff organization standing to challenge the defendants' violation of the FHA. *Id.*

Subsequently, other courts have relied on *Havens Realty* to find injury-in-fact to organizations offering voter assistance when the organization was forced to devote resources to counteract the effects of the state voting laws alleged to conflict with federal voting laws. For example, in *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017), the plaintiff was a nonprofit organization conducting get-out-the-vote efforts among voters with limited English proficiency. The suit challenged as preempted by Section 208 a Texas law restricting who could assist such voters. The plaintiff organization alleged that it had been injured by the need for "additional time and effort spent explaining the Texas provisions at issue to limited English proficient voters" because "addressing the challenged provisions frustrates and complicates its routine community out-reach activities." *Id.* at 610. The Fifth Circuit held this was a sufficient injury-in-fact to establish organizational standing because the Texas law at issue forced the nonprofit to divert resources and "perceptibly impaired

[its] ability to get out the vote among its members." *Id.* at 612 (internal quotation marks omitted). *See also Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165-66 (11th Cir. 2008) (organizations challenging the state procedures for first-time registrants alleged an injury-in-fact sufficient to support organizational standing where the plaintiff organizations "reasonably anticipate that they will have to divert personnel and time to educating volunteers and voters on compliance with [the registration requirements] and to resolving the problem of voters left off the registration rolls on election day"); *Common Cause Ind. v. Lawson*, 937 F.3d 944, 952 (7th Cir. 2019) (plaintiff entity was injured where it had "devoted additional time and resources to ameliorating" the effects of a state voter roll provision that would automatically remove a voter from the state roll based on information from a third-party database); *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1039 (9th Cir. 2015) (plaintiff organization's alleged injury of diversion of resources supported lawsuit alleging state's failure to comply with a federal law intended to facilitate voter registration by low-income citizens and those with disabilities); *Scott v. Schedler*, 771 F.3d 831, 837 (5th Cir. 2014) (plaintiff organization had standing to sue for state's failure to provide recipients of federal benefits with voter registration forms, as required by the National Voter Registration Act, where the plaintiff organization alleged it had to devote resources to counteract the violation). In each case, the federal law at issue protected the rights of the voter, not the plaintiff entity, and in each case, the organization established standing by showing that the state's alleged violation of the federal law vis-à-vis voters required the organization to divert resources

to respond. The same is true here. Arkansas United has pleaded sufficient facts, taken as true, to establish that it suffered an injury-in-fact because of the six-voter limit. It is of no significance that Plaintiffs are not themselves voters denied the protections of Section 208.

2. Plaintiffs' Injury is Traceable to State Defendants and Redressable

Plaintiffs have also alleged sufficient facts to demonstrate that the alleged injury is fairly traceable to State Defendants. As alleged in the Amended Complaint, the members of the State Board of Election Commissioners are responsible for "providing statewide guidance and training to election officers and county election commissioners." (Doc. 79, ¶ 14). The Board also "monitors compliance by local election authorities with federal and state election laws." *Id.* Secretary Thurston is the chairperson of the Board and the state's chief election official. *See id.* at ¶ 13. Thus, Plaintiffs' alleged injury is fairly traceable to State Defendants because State Defendants train the county officials and monitor their compliance with state and federal election laws, including the six-voter limit.

Similarly, Plaintiffs' injury is redressable by a favorable decision. Since State Defendants are responsible for oversight and training of county election commissions, a declaratory judgment that the six-voter limit is unconstitutional and an injunction preventing further implementation will cause State Defendants to provide updated training to county election officials, providing

redress for Plaintiffs' alleged injury. *See OCA-Greater Houston*, 867 F.3d at 613-14 (holding that where a state election statute was preempted by the VRA, plaintiffs' injury was "without question, fairly traceable to and redressable by the . . . Secretary of State, who serves as the `chief election officer of the state'") (quoting Tex. Elec. Code § 31.001(a)).

C. Prosecuting Attorneys are not Necessary Parties

Next, Defendants claim that the prosecuting attorneys are necessary and indispensable parties, and because Plaintiffs failed to include them as parties, the Court should dismiss the action pursuant to Rule 12(b)(7). These parties are necessary, State Defendants argue, because Plaintiffs seek an injunction against the implementation or enforcement of Arkansas Code § 7-5-310(b)(4)(B), violations of which are prosecuted by prosecuting attorneys, not by state or county election officials. Since State Defendants do not enforce the six-voter limit, they argue, Plaintiffs cannot obtain the relief they seek without the participation of the local prosecuting attorneys.

To determine whether a party is necessary or indispensable, courts conduct a context-sensitive inquiry under Rule 19. *See Two Shields v. Wilkinson*, 790 F.3d 791, 798 (8th Cir. 2015). Courts begin the inquiry of whether to dismiss under Rule 12(b)(7) by determining if the party is necessary under Rule 19(a)(1). Pursuant to Rule 19(a)(1), a party is necessary if:

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

The Court finds that the local prosecuting attorneys are not necessary parties. First, the Court can grant complete relief among the existing parties. As already discussed above with regard to traceability and redressability, State Defendants train county election officials in election procedures, including their obligation to keep a list of assistors and their power to transmit possible violations to the prosecuting attorney. A declaratory judgment that the six-voter limit is preempted by Section 208 and an injunction prohibiting Defendants from enforcing it will provide complete relief among the existing parties. Thus, the requirements of Rule 19(a)(1)(A) are satisfied.

To the extent that State Defendants argue that the local prosecuting attorneys have an interest in the outcome of the litigation, the Court notes that no prosecuting attorneys' offices have claimed such an interest pursuant to Rule 19(a)(1)(B). Furthermore, the Court is confident that State Defendants are zealously advocating for the general constitutionality of the six-voter limit, and the ability of the local prosecuting attorneys to protect their interests is not impaired or impeded. *Cf. Rochester Methodist Hosp. v. Travelers Ins. Co.*, 728 F.2d 1006, 1016 (8th Cir. 1984) (holding that the Department of Health and Human Services ("HHS") was not a necessary party under Rule 19(a)(1) or (2) where it sought to intervene because of a potential obligation to indemnify Travelers but where a United States Attorney was representing Travelers and "making every argument that HHS would or could make if it had been allowed to intervene formally"). For these reasons, the Court rejects State Defendants' argument that the Amended Complaint should be dismissed for failure to join the prosecuting attorneys.

D. Plaintiffs State a Claim for Relief

The Court now turns to State Defendants' argument that Plaintiffs fail to state a claim for which relief can be granted pursuant to Rule 12(b)(6). Plaintiffs' claim is that Arkansas Code §§ 7-5-310(b)(4)(B), 7-5-310(b)(5), 7-1-103(a)(19) and 7-1-103(b)(1) are preempted by Section 208 of the VRA because the voter assistance restrictions in Arkansas law make it an "impossibility" for a voter with limited English proficiency to choose an assistor when that assistor has already helped six other voters. Plaintiffs' argument

thus presents a question of conflict preemption. "Conflict preemption exists where a party's compliance with both federal and state law would be impossible or where state law would pose an obstacle to the accomplishment of congressional objectives." *Pet Quarters, Inc. v. Depository Tr. & Clearing Corp.*, 559 F.3d 772, 780 (8th Cir. 2009). "Whether a particular federal statute preempts state law depends upon congressional purpose." *In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Pracs. Litig.*, 621 F.3d 781, 791 (8th Cir. 2010). "There is a presumption against preemption in areas of traditional state regulation, [which] is overcome if it was the clear and manifest purpose of [Congress] to supersede state authority." *Wuebker v. Wilbur-Ellis Co.*, 418 F.3d 883, 887 (8th Cir. 2005) (internal quotation marks omitted).

State Defendants argue that Plaintiffs fail to state a claim because the challenged laws are reasonable, nondiscriminatory, and further a compelling state interest. State Defendants also argue that the right to choose an assistor protected by Section 208 does not extend to *any* person of the voter's choosing, and the state may place additional restrictions on the choice of assistor without creating a conflict with Section 208.

The discussion of Section 208 in the Senate Report addresses the issue of state legislation as follows:

> The Committee intends that voter assistance procedures, including measures to assure privacy for the voter and the secrecy of his vote be established in a manner which encourages

> greater participation in our electoral process. The Committee recognizes 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.
>
> State provisions would be preempted only to the extent that they unduly burden the right recognized in this section, with that determination being a practical one dependent upon the facts. Thus, for example, a procedure could not deny the assistance at some stages of the voting process during which assistance was needed, nor could it provide that a person could be denied assistance solely because he could read or write his own name.
>
> By including the blind, disabled, and persons unable to read or write under this provision, the Committee does not require that each group of individuals be treated identically for purposes of voter assistance procedures. States, for example, might have reason to authorize different kinds of assistance for the blind as opposed to the illiterate. The Committee has simply concluded that, at the least, members of each group are entitled to assistance from a person of their own choice.

S. Rep. No. 417, 97th Cong., 2d Sess. at 62-63.

Appendix D

The language of the Senate Report suggests that some state legislation on the topic of voter assistance is permissible. Given the Committee's admonishment that the inquiry of whether a state provision unduly burdens the right to have the assistance of a person of the voter's choice is "a practical one dependent upon the facts," the Court finds it inappropriate at this juncture to take up whether the state laws challenged here impermissibly conflict with Section 208. The standard applicable to a motion to dismiss is a generous one that assumes all facts pleaded are true and makes reasonable inferences in Plaintiffs' favor. The Amended Complaint pleads sufficient facts to allow the Court to make the reasonable inference that the six-voter limit may unduly burden a voter with limited proficiency in English. For example, Plaintiffs allege that because of the limit, their members "are prevented from selecting their preferred voter assistor and must rely on assistors that they do not fully trust to help them translate and cast their ballot." (Doc. 79, ¶ 51). Plaintiffs further allege that some staff and volunteers from whom voters might have wanted assistance declined to help "[b]ecause of the threat of criminal prosecution and the fear associated with their names appearing on the list." *Id.* at ¶ 61. While these assertions might not be sufficient, without more, to create a genuine dispute of material fact at summary judgment, they are adequate to satisfy the pleading standard and state a claim that Arkansas Code §§ 7-5-310(b)(4)(B), 7-5-310(b)(5), 7-1-103(a)(19) and 7-1-103(b)(1) are preempted by Section 208.

E. Laches Does Not Bar Plaintiffs' Claims

Finally, the Court turns to State Defendants' argument that laches bars Plaintiffs' claims. State Defendants argue that the laws Plaintiffs challenge have been in effect for more than a decade and that State Defendants would be burdened if they had to modify their "familiar training and procedures" and implement "entirely new ones." (Doc. 87, p. 25). The doctrine of laches is an equitable defense. . . ." *Goodman v. McDonnell Douglas Corp.*, 606 F.2d 800, 804 (8th Cir. 1979). "For the application of the doctrine of laches to bar a lawsuit, the plaintiff must be guilty of unreasonable and inexcusable delay that has resulted in prejudice to the defendant." *Id.* Neither of the elements of the defense is satisfied here.

First, the Court cannot conclude that Plaintiffs are guilty of unreasonable and inexcusable delay in bringing this suit. Even though the six-voter limit was enacted more than a decade ago, Plaintiffs would not have had standing to challenge it until they could plead an injury-in-fact. State Defendants have not offered any basis for the Court to conclude that Plaintiffs experienced harm long before this suit was filed. In fact, the Amended Complaint indicates that it was only in October 2020, in light of the response to their voter out-reach efforts, that Plaintiffs realized there might be a greater number of voters than usual requesting Plaintiffs' assistance on Election Day. (Doc. 79, ¶ 55)

Further, the equitable basis for this defense is made even less compelling by the fact that Plaintiffs seek

only prospective relief. They are not claiming damages for previous elections in which they failed to bring suit. Finally, State Defendants have not identified any legitimate prejudice. There are many months remaining before the next election. State Defendants (and County Defendants) have ample time to adjust their practices to conform to the VRA. The generalized burden of modifying "familiar training and procedures" to conform with federal law cannot constitute prejudice for equitable purposes.

IV. STATE DEFENDANTS' MOTION FOR INTERLOCUTORY APPEAL

In the alternative, State Defendants ask the Court to stay discovery and certify various questions for interlocutory appeal under 28 U.S.C.§ 1292(b). A district judge may certify for interlocutory appeal an order that "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). In *Control Data Corp. v. IBM*, 421 F.2d 323 (8th Cir. 1970), the Eighth Circuit cautioned that "[i]t has long been the policy of the courts to discourage piecemeal appeals because most often such appeals result in additional burdens on both the court and the litigants. Permission to allow interlocutory appeals should thus be granted sparingly and with discrimination." *Id.* at 325.

State Defendants identify seven questions they characterize as "not only issues of first impression in the Eighth Circuit but also novel questions of federal law that

have yet to receive the considered attention of *any* court of appeals." (Doc. 87, p. 31 (emphasis in original)). The Court disagrees. None of the questions for which State Defendants seek certification are issues "as to which there is substantial ground for difference of opinion." As is clear from the discussion above, the Court does not consider it to be a close question whether voters with limited-English proficiency are protected by Section 208—State Defendants' first question—and myriad courts and the Department of Justice have reached the same conclusion, which is also supported by the legislative history. *See supra* pp. 786-87. Since the Court addressed only the *Ex parte Young* exception to state sovereign immunity and not abrogation by Congress, State Defendants' second question is also inappropriate for interlocutory appeal. As to whether Section 208 is congruent and proportional to a history of violations, the Court considers that the text of the VRA and the legislative history amply support an affirmative response to questions three and four. *See supra* pp. 789-90. And given the number of courts across the country that have taken up claims under Section 208 on the merits, the stringent requirements for appeal under § 1296(b) are not satisfied here. Nor is it a close question whether the VRA contains an explicit private right of action or whether plaintiff entities can establish organizational standing to challenge violations of statutes that protect the rights of voters. The Court's discussion above, *supra* pp. 789-91 & 793-94, makes clear that other courts that have considered State Defendants' fifth and sixth questions for interlocutory appeal have consistently reached the same conclusion as this Court. Finally, the Court has not reached a final ruling on the applicability of the undue-burden legal

standard State Defendants invoke and the seventh question on which they seek interlocutory appeal. The Court simply concluded that to the extent the Senate Report supports the notion that some state restrictions may be permissible, Plaintiffs have nevertheless sufficiently pleaded their claims. For these reasons, none of the questions for which State Defendants seek certification are appropriate for interlocutory appeal under 28 U.S.C. § 1292(b), and this alternative relief is also denied.

V. CONCLUSION

Accordingly, the Motions to Dismiss filed by Benton County Defendants (Doc. 84), Sebastian County Defendants (Doc. 82) and State Defendants (Doc. 86) are **DENIED**. State Defendants' request that, in the alternative, the Court stay discovery and certify issues for appeal under 28 U.S.C. § 1292(b) is also **DENIED**.

IT IS SO ORDERED on this 5th day of February, 2021.

s/ Timothy L. Brooks
TIMOTHY L. BROOKS
UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED OCTOBER 24, 2025

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 22-2918

ARKANSAS UNITED AND
L. MIREYA REITH

Appellees

v.

JOHN THURSTON, IN HIS OFFICIAL CAPACITY AS THE SECRETARY OF STATE OF ARKANSAS, *et al.*

Appellants

REMEE OELSCHLAEGER, IN HER OFFICIAL CAPACITY AS A MEMBER OF THE WASHINGTON COUNTY ELECTION COMMISSION, *et al.*

STATE OF NEBRASKA, *et al.*

Amici on Behalf of Appellant(s)

Appendix E

UNITED STATES

Amicus on Behalf of Appellee(s)

No: 23-1154

ARKANSAS UNITED AND
L. MIREYA REITH

Appellees

v.

JOHN THURSTON, IN HIS OFFICIAL
CAPACITY AS THE SECRETARY OF
STATE OF ARKANSAS, *et al.*

Appellants

REMEE OELSCHLAEGER, IN HER OFFICIAL
CAPACITY AS A MEMBER OF THE WASHINGTON
COUNTY ELECTION COMMISSION, *et al.*

UNITED STATES

Amicus on Behalf of Appellee(s)

Appeals from U.S. District Court for the
Western District of Arkansas - Fayetteville
(5:20-cv-05193-TLB)

Appendix E

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

Chief Judge Colloton, Judge Smith, Judge Kelly, and Judge Erickson would grant the petition for rehearing en banc.

COLLOTON, Chief Judge, with whom SMITH, KELLY, and ERICKSON, Circuit Judges, join, dissenting from denial of rehearing en banc.

I would grant the petition for rehearing en banc to address a question of exceptional importance. The district court determined that the Arkansas statute at issue is preempted by federal law, and the panel did not address that point. The panel ruled instead that only the Attorney General of the United States can bring an action to challenge the Arkansas provision. The question is whether the plaintiffs in this case may seek equitable relief to enjoin enforcement of a preempted state statute. *See, e.g., Local Union No. 12004, United Steelworkers v. Massachusetts*, 377 F.3d 64, 75 & n.8 (1st Cir. 2004).

Unlike "the judicially unadministrable" federal statute that precluded the availability of equitable relief in *Armstrong v. Exceptional Child Center, Inc.*, 575 U.S. 320, 328 (2015), § 208 of the Voting Rights Act is readily administrable. *See* 52 U.S.C. § 10508; *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614-15 (5th Cir. 2017). The panel misconstrued Armstrong to mean that equitable

relief is available only "when no other remedy is available." *Ark. United v. Thurston*, 146 F.4th 673, 679 (8th Cir. 2025). The Supreme Court has held to the contrary. *Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 256 n.3 (2011). The Court in Armstrong acknowledged Stewart and declined to hold that availability of another enforcement mechanism was sufficient to preclude equitable relief. 575 U.S. at 328.

The State did not appeal the district court's recognition of a claim for equitable relief under the doctrine of *Ex parte Young*, 209 U.S. 123 (1908). *See* R. Doc. 179, at 30. The State's lead argument against rehearing, ironically, is that the plaintiffs supposedly forfeited their claim to equitable relief. But the panel addressed the question on the merits and established a precedent that will carry forward unless the decision is revisited. The full court should thus reconsider this case and apply a correct legal framework.

Unfortunately, the court instead continues on a regrettable path of rendering unenforceable, in this circuit alone, the voting rights law that many have considered "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, p. 111 (1982)). *Cf. Turtle Mountain Band of Chippewa Indians v. Howe*, 137 F.4th 710 (8th Cir.), *mandate stayed*, 145 S. Ct. 2876, *petition for cert. filed* (U.S. Sept. 4, 2025) (No. 25-253). *Compare Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023), *with Robinson v. Ardoin*, 86 F.4th 574, 587-88 (5th Cir. 2023); *Singleton v. Allen*, 782 F. Supp. 3d 1092, 1322 (N.D. Ala. 2025) (three-judge court)

(per curiam) (rejecting Eighth Circuit decision and stating that "[i]t is difficult in the extreme for us to believe that for nearly sixty years, federal courts have consistently misunderstood one of the most important sections of one of the most important civil rights statutes in American history, and that Congress has steadfastly refused to correct our apparent error."), *appeal docketed* (U.S. Sept. 10, 2025) (No. 25-273); *Miss. State Conf. NAACP v. State Bd. of Election Comm'rs*, 739 F. Supp. 3d 383, 410, 412 (S.D. Miss. 2024) (three-judge court) (per curiam) (finding "Chief Judge Smith's dissent in that [Eighth Circuit] case to express the more persuasive analysis," and concluding that "[i]f a court now holds, after almost 60 years, that cases filed by private individuals were never properly brought, it should be the Supreme Court [that] has the controlling word on so momentous a change"), *appeal docketed* (U.S. Aug. 28, 2025) (No. 25-234), *and Ga. State Conf. of NAACP v. Georgia*, No. 1:21-CV-5338, 2022 WL 18780945, at *4 (N.D. Ga. Sept. 26, 2022) (three-judge court) (per curiam) ("We think it obvious that, by its clear terms, Section 2 guarantees a particular individual right to all citizens: *i.e.*, a right not to have one's vote denied or abridged on account of race or color.").

October 24, 2025

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Susan E. Bindler

APPENDIX F — RELEVANT STATUTORY PROVISIONS

52 U.S.C. § 10508.
Voting assistance for blind, disabled or illiterate persons

Effective: September 1, 2014

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.

* * *

Appendix F

A.C.A. § 7-1-103.
Miscellaneous misdemeanor offenses--Penalties--
Definitions

Effective: July 28, 2021

(a) The violation of any of the following shall be deemed misdemeanors punishable as provided in this section:

(1) It shall be unlawful for any person to appoint or offer to appoint anyone to any office or position of trust or for any person to influence, attempt to influence, or offer to influence the appointment, nomination, or election of any person to office in consideration of the support or assistance of the person for any candidate in any election in this state;

(2)(A)(i) It shall be unlawful for any public servant, as defined in § 21-8-402, to devote any time or labor during usual office hours toward the campaign of any other candidate for office or for the nomination to any office.

(ii) Devoting any time or labor during usual office hours toward the campaign of any other candidate for office or for the nomination to any office includes without limitation the gathering of signatures for a nominating petition.

(B) It shall be unlawful for any public servant, as defined in § 21-8-402, to circulate an initiative or referendum petition or to solicit signatures on

an initiative or referendum petition in any public office of the state, county, or municipal governments of Arkansas or during the usual office hours or while on duty for any state agency or any county or municipal government in Arkansas.

(C) It shall be unlawful for any public servant, as defined in § 21-8-402, to coerce, by threats or otherwise, any public employee into devoting time or labor toward the campaign of any candidate for office or for the nomination to any office;

(3)(A) It shall be unlawful for any public servant, as defined in § 21-8-402, to use any office or room furnished at public expense to distribute any letters, circulars, or other campaign materials unless such office or room is regularly used by members of the public for such purposes without regard to political affiliation. It shall further be unlawful for any public servant to use for campaign purposes any item of personal property provided with public funds.

(B) As used in subdivision (a)(3)(A) of this section, "campaign materials" and "campaign purposes" refer to:

(i) The campaign of a candidate for public office; and

(ii) Efforts to support or oppose a ballot measure, except as provided in § 7-1-111;

(4) It shall be unlawful for any person to assess any public employee, as defined in § 21-8-402, for any political purpose whatever or to coerce, by threats or otherwise, any public employee into making a subscription or contribution for any political purpose;

(5) It shall be unlawful for any person employed in any capacity in any department of the State of Arkansas to have membership in any political party or organization that advocates the overthrow of our constitutional form of government;

(6) It shall be unlawful for any campaign banners, campaign signs, or other campaign literature to be placed on any cars, trucks, tractors, or other vehicles belonging to the State of Arkansas or any municipality, county, or school district in the state;

(7)(A)(i) All articles, statements, or communications appearing in any newspaper printed or circulated in this state intended or calculated to influence the vote of any elector in any election and for the publication of which a consideration is paid or to be paid shall clearly contain the words "Paid Political Advertisement", "Paid Political Ad", or "Paid for by" the candidate, committee, or person who paid for the message.

(ii) Both the persons placing and the persons publishing the articles, statements, or communications shall be responsible for including the required disclaimer.

(B)(i) All articles, statements, or communications appearing in any radio, television, or any other electronic medium intended or calculated to influence the vote of any elector in any election and for the publication of which a consideration is paid or to be paid shall clearly contain the words:

(a) "Paid political advertisement" or "paid political ad"; or

(b) "Paid for by", "sponsored by", or "furnished by" the true sponsor of the advertisement.

(ii) Both the persons placing and the persons publishing the articles, statements, or communications shall be responsible for including the required disclaimer;

(8)(A) An election official acting in his or her official capacity shall not do any electioneering:

(i) On election day or any day on which early voting is allowed;

(ii) In a building in which voting is taking place; or

(iii) Within one hundred feet (100') of the primary exterior entrance used by voters to a building in which voting is taking place.

(B) On early voting days and election day, a person shall not do any electioneering during voting hours:

(i) In a building in which voting is taking place;

(ii) Within one hundred feet (100') of the primary exterior entrance used by voters to a building in which voting is taking place; or

(iii) With persons standing in line to vote.

(C)(i) As used in this subdivision (a)(8), "electioneering" means the display of or audible dissemination of information that advocates for or against any candidate, issue, or measure on a ballot.

(ii) "Electioneering" includes without limitation the following:

(a) Handing out, distributing, or offering to hand out or distribute campaign literature or literature regarding a candidate, issue, or measure on the ballot;

(b) Soliciting signatures on a petition;

(c) Soliciting contributions for a charitable or other purpose;

(d) Displaying a candidate's name, likeness, or logo;

(e) Displaying a ballot measure's number, title, subject, or logo;

(f) Displaying or dissemination of buttons, hats, pencils, pens, shirts, signs, or stickers containing electioneering information; and

(g) Disseminating audible electioneering information.

(iii) "Electioneering" does not include:

(a) The presentation of a candidate's identification by the candidate under Arkansas Constitution, Amendment 51, § 13; or

(b) The display of a ballot measure in the polling place as required under § 7-5-202;

(9) No election official shall perform any of the duties of the position before taking and subscribing to the oath provided for in § 7-4-110;

(10) No person applying for a ballot shall swear falsely to any oath administered by the election officials with reference to his or her qualifications to vote;

(11) No person shall willfully cause or attempt to cause his or her own name to be registered in any other election precinct than that in which he or she is or will be before the next ensuing election qualified as an elector;

(12) During any election, no person shall remove, tear down, or destroy any booths or supplies or other conveniences placed in any booth or polling site for the purpose of enabling the voter to prepare his or her ballot;

(13) No person shall take or carry any ballot obtained from any election official outside of the polling room or have in his or her possession outside of the polling room before the closing of the polls any ballot provided by any county election commissioner;

(14) No person shall furnish a ballot to any elector who cannot read informing him or her that it contains a name or names different from those that are written or printed thereon or shall change or mark the ballot of any elector who cannot read so as to prevent the elector from voting for any candidate, act, section, or constitutional amendment as the elector intended;

(15) No election official or other person shall unfold a ballot or without the express consent of the voter ascertain or attempt to ascertain any vote on a ballot before it is placed in the ballot box;

(16) No person shall print or cause to be printed any ballot for any election held under this act with the names of the candidates appearing thereon in any other or different order or manner than provided by this act;

(17) No election official shall permit the vote of any person to be cast in any election precinct in this state in any election legally held in this state when the person does not appear in person at the election precinct and actually cast the vote. This subdivision (a)(17) shall not apply to persons entitled to cast absentee ballots;

(18)(A) No person shall vote or offer to vote more than one (1) time in any election held in this state, either in person or by absentee ballot, or shall vote in more than one (1) election precinct in any election held in this state.

(B) No person shall cast a ballot or vote in the preferential primary of one (1) political party and then cast a ballot or vote in the general primary of another political party in this state;

(19) No person shall:

(A) Vote, knowing himself or herself not to be entitled to vote;

(B) Vote more than once at any election or knowingly cast more than one (1) ballot or attempt to do so;

(C) Provide assistance to a voter in marking and casting the voter's ballot except as provided in § 7-5-310;

(D) Alter or attempt to alter any ballot after it has been cast;

(E) Add or attempt to add any ballot to those legally polled at any election either by fraudulently introducing it into the ballot box before or after the ballots have been counted or at any other time or in any other manner with the intent or effect of affecting the count or recount of the ballots;

(F) Withdraw or attempt to withdraw any ballot lawfully polled with the intent or effect of affecting the count or recount of the ballots; or

(G) In any manner interfere with the officials lawfully conducting the election or the canvass or with the voters lawfully exercising their right to vote at the election;

(20) No person shall make any bet or wager upon the result of any election in this state;

(21) No election official, poll watcher, or any other person in or out of this state in any primary, general, or special election in this state shall divulge to any person the results of any votes cast for any candidate or on any issue in the election until after the closing of the polls on the day of the election. The provisions of this subdivision (a)(21) shall not apply to any township or precinct in this state in which all of the registered voters therein have voted prior to the closing of the polls in those instances in which there are fifteen (15) or fewer registered voters in the precinct or township;

(22) Any person, election official, county clerk, or deputy clerk who violates any provisions of the absentee voting laws, § 7-5-401 et seq., shall be punished as provided in this section;

(23) No person applying to be placed on a ballot for any public office shall knowingly provide false information with reference to his or her qualifications; and

(24) A person shall not enter or remain in an area within one hundred feet (100') of the primary exterior entrance to a building where voting is taking place except for a person entering or leaving a building where voting is taking place for lawful purposes.

(b)(1) Except as otherwise provided, the violation of any provision of this section shall be a Class A misdemeanor.

(2)(A) Any person convicted under the provisions of this section shall thereafter be ineligible to hold any office or employment in any of the departments in this state.

(B)(i) If any person is convicted under the provisions of this section while employed by any of the departments of this state, he or she shall be removed from employment immediately.

(ii) If any person is convicted under the provisions of this section while holding public office, the conviction shall be deemed a misfeasance and

malfeasance in office and shall subject the person to impeachment.

(3) A person convicted of a misdemeanor offense as listed in this section shall be barred from serving as an election official in subsequent elections.

(c) Any violation of this act not covered by this section and § 7-1-104 shall be considered a Class A misdemeanor and shall be punishable as such.

* * *

Appendix F

A.C.A. § 7-5-310.
Privacy--Assistance to voters with disabilities

Effective: August 5, 2025

(a)(1) Each voter shall be provided the privacy to mark his or her ballot. Privacy shall be provided by the poll workers at each polling site or by the county clerk, if the county clerk conducts early voting, to ensure that a voter desiring privacy is not singled out.

(2)(A) In a county that uses paper ballots, the county board of election commissioners shall determine and provide the appropriate number of voting booths for each polling site.

(B) A voting booth shall be:

(i) Constructed to permit the voter to prepare his or her ballot while screened from observation;

(ii) Furnished with supplies and conveniences that will enable the voter to prepare his or her ballot; and

(iii) Situated in the plain view of a poll worker.

(C) If a person is not a poll worker and is not casting a ballot, he or she shall not be within six feet (6) of the voting booths, unless:

(i) The person is authorized by an election judge; and

(ii) The person's presence is necessary to keep order or enforce the law.

(3) A person may not enter a polling site on election day during voting hours unless the person is:

(A) An election official;

(B) An authorized poll watcher;

(C) A voter present to cast his or her ballot;

(D) A person in the care of a voter if the person:

(i) Does not disrupt or interfere with the normal voting procedures; and

(ii) Is not eligible to vote in that election;

(E) A person lawfully assisting the voter;

(F) A law enforcement officer or emergency service personnel who are acting in the line of duty;

(G) A monitor authorized by the State Board of Election Commissioners or observer authorized by a federal agency with the authority to place the observer at the polling site;

(H)(i) A person with business in the polling site that is not connected to the election.

(ii) A person with business in the polling site that is not connected to the election shall remain outside of the voter processing area or voting room except to pass through or by the voter processing area or voting room without speaking to a voter or an election official and with the purpose to conduct his or her business;

(I) A person whom the county clerk or the county board of election commissioners has authorized to assist in conducting the election;

(J) A person authorized by the State Board of Election Commissioners or the county board of election commissioners; or

(K) The county clerk.

(b)(1) A voter shall inform the poll workers at the time that the voter presents himself or herself to vote that he or she is unable to mark or cast the ballot without help and needs assistance in casting or marking his or her ballot.

(2) The voter shall be directed to a voting machine equipped for use by persons with disabilities by which he or she may elect to cast his or her ballot without assistance, or the voter may request assistance with either the paper ballot or the voting machine, depending on the voting system in use for the election, by:

(A) Two (2) poll workers; or

(B) A person named by the voter who:

(i) Is present in the polling site;

(ii) Is eighteen (18) years of age or older; and

(iii) Presents a document or identification card that meets the requirements established by the State Board of Election Commissioners.

(3) If the voter is assisted by two (2) poll workers, one (1) of the poll workers shall observe the voting process and one (1) may assist the voter in marking and casting the ballot according to the wishes of the voter without comment or interpretation.

(4)(A)(i) If the voter is assisted by one (1) person named by the voter, he or she may assist the voter in marking and casting the ballot according to the wishes of the voter without any comment or interpretation.

(ii) If an election official witnesses the person assisting the voter commenting or interpreting in violation of subdivision (b)(4)(A)(i) of this section:

(a) The election official may cause the person assisting the voter to be removed from the polling site; and

(b) If the voter requests additional assistance in marking and casting his or her ballot, it may be provided by two (2) election officials trained to do so.

(B) No person other than the following shall assist more than six (6) voters in marking and casting a ballot at an election:

(i) A poll worker;

(ii) The county clerk during early voting; or

(iii) A deputy county clerk during early voting.

(C) If the person whose assistance has been requested by the voter is a candidate on the ballot:

(i) The candidate shall not assist more than six (6) voters in the election; and

(ii) The candidate may only assist a voter who is related to the candidate within the second degree of consanguinity.

(5)(A) It shall be the duty of the poll workers at the polling site to make and maintain a list of the names and addresses of all persons assisting voters.

(B) The list shall contain the name of the assistor as it appears on the document or identification card presented by the assistor under subdivision (b)(2)(B)(iii) of this section.

(c) Any voter who, because of physical, sensory, or other disability, presents himself or herself for voting and then informs a poll worker at the polling site that he or she is unable to stand in line for extended periods of time shall be entitled to and assisted by a poll worker to advance to the head of any line of voters then waiting in line to vote at the polling site.

(d) The State Board of Election Commissioners shall promulgate rules concerning the required documents or identification necessary to assist a voter with a disability under subdivision (b)(2)(B)(iii) of this section.