Nos. 22-2918, 23-1154

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

ARKANSAS UNITED and L. MIREYA REITH,

Plaintiffs-Appellees

v.

JOHN THURSTON, in his official capacity as Secretary of State of Arkansas, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF ARKANSAS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF APPELLEES AND URGING AFFIRMANCE ON THE ISSUES ADDRESSED HEREIN

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INTEREST OF THE UNITED STATES

Section 208 of the Voting Rights Act (VRA) 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. Thus, for voters with disabilities and those unable to read or write, federal law guarantees voting assistance by a person of the voter's choice subject to two exceptions confined to only the voter's employer or union.

As relevant here, Arkansas law prohibits an individual other than a poll worker from assisting more than six voters in marking or casting a ballot. Ark. Code Ann. § 7-5-310(b)(4)(B) (2024). Arkansas law further provides that a person who violates its six-voter assistance limit can be subjected to criminal misdemeanor penalties, including imprisonment up to one year, and a fine of up to $2500. Ark. Code Ann. § 7-1-103(a)(19)(C) and (b)(1) (2024); *id.* §§ 5-4-201(b)(1), -401(b)(1).

Congress vested the Attorney General with authority to enforce the VRA on behalf of the United States. *See* 52 U.S.C. 10101(c), 10307(a), 10308(d), 10504. This case involves important questions regarding private enforcement of Section 208 and the scope of the voter-assistance protections that Congress enacted. The

United States has a substantial interest in ensuring that the rights guaranteed by the VRA, including by Section 208, can be fully realized and effectively secured.

The United States files this brief under Federal Rule of Appellate Procedure 29(a).

STATEMENT OF THE ISSUES AND APPOSITE CASES

The United States addresses the following issues:

1. Whether the district court correctly concluded that private plaintiffs can bring an action for injunctive relief under *Ex parte Young* seeking to enjoin enforcement of Arkansas's six-voter assistance limit and its accompanying criminal penalties.

Apposite Authority: *Ex parte Young*, 209 U.S. 123 (1908); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015); *Gonzaga Univ. v. Doe*, 536 U.S. 273 (2002).

2. Whether the district court correctly concluded that Arkansas's six-voter assistance limit conflicts with Section 208 of the VRA and is preempted under the Supremacy Clause.

Apposite Authority: *OCA-Greater Hous. v. Texas*, 867 F.3d 604 (5th Cir. 2017); *Democracy N.C. v. North Carolina State Bd. of Elections*, 476 F. Supp. 3d 158 (M.D.N.C. 2020); *Disability Rts. N.C. v. North Carolina State Bd. of*

Elections, 602 F. Supp. 3d 872 (E.D.N.C. 2022); *see also Crosby v. National Foreign Trade Council*, 530 U.S. 363 (2000).

STATEMENT OF THE CASE

1. In 1982, Congress enacted Section 208 of the VRA upon finding 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. 62 (1982) (Senate Report). Congress recognized that the need for assistance may render voters who are blind, have a disability, lack a written language, or are "unable to read or write sufficiently well to understand the election material and the ballot" more susceptible to undue influence, manipulation, and discrimination. *Ibid.*; *see also* H.R. Rep. No. 227, 97th Cong., 1st Sess. 14 (1981) ("[N]umerous practices and procedures," including the "failure to provide or abusive manipulation of assistance to illiterates," "act as continued barriers to registration and voting[.]").

"To limit the risks of discrimination" and "avoid denial or infringement of their right to vote," Congress mandated that such voters "be permitted to have the assistance of a person of their own choice" in voting. Senate Report 62. Under Section 208, Congress simultaneously prohibited assistance by a voter's employer or union officer, thereby limiting opportunities for the voter to be coerced or misled into voting for someone other than their candidate of choice. *Id.* at 62-64.

Congress expected that Section 208 would preempt state election laws "to the extent that they unduly burden the right recognized in [Section 208], with that determination being a practical one dependent upon the facts." *Id.* at 63.

Courts have consistently and correctly understood and applied Section 208 to protect voters with limited English proficiency. *See, e.g.*, *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 616 (5th Cir. 2017) (affirming decision that Section 208 preempts state law requirements regarding who can provide language assistance to a voter at the polls); *United States v. Berks Cnty.*, 277 F. Supp. 2d 570, 580 (E.D. Pa. 2003) (holding that denying Spanish-speaking voters assistance by a person of their choice violates Section 208).

2. The plaintiffs in this case are a non-profit organization called Arkansas United and its executive director. As relevant here, Arkansas United assists voters with limited English proficiency in translating and understanding their ballots at polling places. Plaintiffs sued to enjoin enforcement of the six-voter assistance limit and its related criminal penalties as contrary to Section 208 of the VRA.

On cross-motions for summary judgment, the district court ruled in favor of plaintiffs and permanently enjoined enforcement of the six-voter assistance limit and its associated criminal penalties. App. 482-483; R. Doc. 168, at 37-38.

As a threshold matter, the court rejected defendants' argument that plaintiffs' suit is barred by sovereign immunity. In rejecting that argument, the

court held that plaintiffs could sue under *Ex parte Young* and concluded that the other remedies available under the VRA do not reflect any congressional intent to foreclose such suits for injunctive relief. App. 474-475; R. Doc. 168, at 29-30 ("[T]he VRA does not lay out alternative sanctions or procedures that would be circumvented by enforcement under *Ex parte Young*."). It further held that Section 208 provides a private right of action. App. 467; R. Doc. 168, at 22 n.11; *see also* App. 66; R. Doc. 102, at 17.

On the merits, the court concluded that Section 208 preempts the six-voter assistance limit because "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." App. 477; R. Doc. 168, at 32. In contrast, the court rejected plaintiffs' argument that Arkansas's assistor-tracking requirement—which requires poll workers to maintain a list of the names and addresses of all persons assisting voters, *see* Ark. Code Ann. § 7-5-310(b)(5) (2024)—conflicts with Section 208. App. 482; R. Doc. 168, at 37. Unlike the six-voter assistance limit, the court explained, the assistor-tracking requirement "does not prevent any voter from selecting the assistor of their choice." App. 482; R. Doc. 168, at 37.

The court accordingly enjoined defendants from enforcing the six-voter assistance limit of Section 7-5-310(b)(4)(B) "or otherwise engaging in any practice that limits the right secured by [Section] 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)." App. 482; R. Doc. 168, at 38.

Defendants timely appealed and successfully sought a stay of the injunction pending appeal under *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam). This Court held this appeal in abeyance pending a decision in *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, in which this Court held that Section 2 of the VRA lacks a private right of action. *See* 86 F.4th 1204, 1216 (8th Cir. 2023). Following the denial of rehearing en banc in *Arkansas State Conference NAACP*, this Court reinstated briefing in this case.

SUMMARY OF ARGUMENT

There is no merit to defendants' argument that *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, 86 F.4th 1204 (8th Cir. 2023), decides this case. That case, which held that Section 2 of the VRA lacks a private right of action, neither included, decided, nor shed light upon the *Ex parte Young* issue that the district court correctly resolved and which renders this suit proper.

In addition to holding that Section 208 is directly enforceable through an implied right of action, the district court also held that this suit—for declaratory and injunctive relief against enforcement of a state law imposing criminal

penalties—can proceed under *Ex parte Young*. That is correct. Defendants do not challenge the district court's *Ex parte Young* holding in their opening brief. Defendants have therefore waived any challenge to that ruling. But waiver aside, this court should affirm because the district court is correct.

Regardless of whether they would otherwise have a private right of action, *Ex parte Young* provides persons subject to criminal penalties under state law the ability to maintain a suit in equity for injunctive relief against state officers who they contend are or will be acting contrary to federal law. In those circumstances, *Ex parte Young* suits are proper unless Congress explicitly or implicitly foreclosed such actions. In this case, Congress did no such thing. To the contrary, the VRA's text and structure make clear that Congress intended vigorous private enforcement of the VRA's substantive provisions, including Section 208.

Moreover, the ability to enforce Section 208 through 42 U.S.C. 1983, the private right of action that Congress created to ensure redress for violations of federal rights, further supports proceeding under *Ex parte Young* here. In neither instance does any indication from Congress counsel against private suits. Defendants' arguments that plaintiffs cannot maintain this action thus fail.

On the merits, the district court correctly held that Arkansas's six-voter assistance limit conflicts with and is preempted by Section 208. The only permissible limitations on the right to assistance for limited English proficient

voters and voters with a disability are the ones that Congress specified in Section 208. In arguing otherwise, defendants improperly conflate the test for unconstitutional burdens on the right to vote with the applicable legal framework for preemption. Because the district court soundly applied the correct legal test, this Court should affirm.

ARGUMENT

I. The district court correctly held that private plaintiffs can sue under *Ex parte Young* to enjoin enforcement of Arkansas's six-voter assistance limit and its accompanying criminal penalties.

In *Arkansas State Conference NAACP v. Arkansas Board of Apportionment*, 86 F.4th 1204 (8th Cir. 2023) (*Arkansas NAACP*), this Court became the first court of appeals to hold that Section 2 of the VRA lacks a private right of action. *Id.* at 1216. Defendants maintain that *Arkansas NAACP* so plainly requires vacatur that this Court need not even hold oral argument in this case before reversing. Br. ii. Defendants are wrong. *Arkansas NAACP* involved a different provision of the VRA, a different state law, and no associated criminal penalties. It does not decide this case. Instead, *Ex parte Young* squarely governs this action.

To be sure, pre-*Arkansas NAACP*, the district court concluded—in our view, correctly—that Section 208 *does* have an implied private right of action. App. 467; R. Doc. 168, at 22 n.12; *see also* App. 66; R. Doc. 102, at 17. Indeed, every court to consider the question has agreed that Section 208 provides a private right

of action. *See Florida State Conf. of NAACP v. Lee*, 576 F. Supp. 3d 974, 990 (N.D. Fla. 2021) (collecting cases). Yet this Court need not and should not reach whether there is an independent, stand-alone private right of action under Section 208, because this case arises in the context of regulated parties subject to criminal penalties under a state law that is preempted by federal statute. *Ex parte Young*, 209 U.S. 123 (1908), provided the district court with the power to hear plaintiffs' request to enjoin a state law that conflicts with federal guarantees.

The district court recognized as much. In addition to holding that Congress intended private enforcement of Section 208 of the VRA, the district court also held that private plaintiffs could seek injunctive relief against state officers under *Ex parte Young*, 209 U.S. 123 (1908). The district court explicitly stated that "Plaintiffs may sue under *Ex parte Young*" and that "the methods of enforcement contained in the VRA do not supplant officer suits under *Ex parte Young*." App. 475; R. Doc. 168, at 30; *see also* App. 61-68; R. Doc. 102, at 12-19. That is correct.

Under *Ex parte Young*—and regardless of whether they would otherwise have a private right of action—private plaintiffs, as regulated persons subject to criminal penalties under state law, can maintain a suit in equity for declaratory and injunctive relief against state officers who they contend are or will be acting contrary to federal law. *See Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S.

320, 326-327 (2015). *Arkansas NAACP* involved no such issue. The district court correctly applied *Ex parte Young* here, and this Court should hold that plaintiffs' request for declaratory and injunctive relief was properly before the district court.

Moreover, in *Arkansas NAACP*, this Court expressly left open the question whether Section 2 can be enforced through 42 U.S.C. 1983, the omnibus private right of action that Congress created to redress violations of federal rights. 86 F.4th at 1218. As with Section 2 of the VRA, Section 208 can be enforced through Section 1983. *See* U.S. Amicus Br. at 20-26, *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 23-3655 (8th Cir. Mar. 25, 2024). Indeed, many of the reasons that support an *Ex parte Young* suit here overlap with those demonstrating that Section 208 plaintiffs can sue under Section 1983.[1] Defendants' arguments in this case fail because both *Ex parte Young* and Section 1983 allow private plaintiffs to assert federal protections that are being infringed under state law.

[1] Before the district court, plaintiffs have a still-pending motion for an indicative ruling under Federal Rule of Civil Procedure 62.1 regarding their request to amend their complaint and make clear that they also seek relief pursuant to Section 1983. R. Doc. 211.

A. *Ex parte Young* allows private plaintiffs to file a suit in equity seeking to enjoin enforcement of state law that is alleged to be contrary to federal law.

Private plaintiffs who are subject to state-law regulation that conflicts with federal law are entitled to bring an equitable action to enjoin enforcement of state law under *Ex parte Young*, 209 U.S. 123 (1908). The Supreme Court has repeatedly made clear that "federal courts have jurisdiction" to resolve claims brought by "plaintiff[s] who seek[] injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute . . . by virtue of the Supremacy Clause." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983). Thus, "federal courts may in some circumstances grant injunctive relief against state officers who are violating, or planning to violate, federal law." *Armstrong*, 575 U.S. at 326.

The ability to bring such suits does not rest on any "implied right of action," *Armstrong*, 575 U.S. at 327, and the Supreme Court has not demanded that plaintiffs establish the sort of private "right" required in implied-right-of-action and Section 1983 cases. Instead, "[t]he ability to sue to enjoin unconstitutional actions by state and federal officers is the creation of courts of equity." *Ibid.* Such *Ex parte Young* preemption claims for injunctive relief are well-established throughout the courts of appeals.

Thus, under *Ex parte Young*, "in suits against state officials for declaratory and injunctive relief, a plaintiff may invoke the jurisdiction of the federal courts by asserting a claim of preemption, even absent an explicit statutory cause of action." *Local Union No. 12004, United Steelworkers v. Massachusetts*, 377 F.3d 64, 75 (1st Cir. 2004); *accord Loyal Tire & Auto Ctr., Inc. v. Town of Woodbury*, 445 F.3d 136, 149 (2d Cir. 2006) (explaining that a plaintiff's "right to bring an action seeking declaratory and injunctive relief from municipal regulation on the ground that federal law preempts that regulation is undisputed"); *Qwest Corp. v. City of Santa Fe*, 380 F.3d 1258, 1266 (10th Cir. 2004) ("A federal statutory right or right of action is not required where a party seeks to enjoin the enforcement of a regulation on the grounds that the local ordinance is preempted by federal law."); *Georgia Latino All. for Hum. Rts. v. Governor of Ga.*, 691 F.3d 1250, 1262 (11th Cir. 2012) (holding, in a challenge to a Georgia immigration law, that private plaintiffs had a right of action, because, "[l]ike the other circuits to address the issue head on, we 'have little difficulty in holding that [Plaintiffs] have an implied right of action to assert a preemption claim seeking injunctive . . . relief'" (second and third alterations in original) (quoting *Planned Parenthood of Hous. & Se. Tex. v. Sanchez*, 403 F.3d 324, 334 n. 47, 335 (5th Cir. 2005))).

B. The district court correctly held that this suit is authorized by *Ex parte Young*.

In addition to holding that Section 208 is directly enforceable through its own right of action, the district court clearly, directly, and repeatedly (at both the motion to dismiss and summary judgment stages) held that "officer suits pursuant to *Ex parte Young* are an appropriate method of enforcing the VRA." App. 67, 475; R. Doc. 102, at 18; R. Doc. 168, at 30 ("[T]he methods of enforcement contained in the VRA do not supplant officer suits under *Ex parte Young*.").

Defendants devote their opening brief solely to extending *Arkansas NAACP* to this case and do not address the district court's *Ex parte Young* holding. Arguments "not raised in an opening brief are deemed waived." *Far E. Aluminium Works Co. v. Viracon, Inc.*, 27 F.4th 1361, 1367 n.2 (8th Cir. 2022) (citation omitted). And as this Court has recognized, "[i]f the district court states multiple alternative grounds for its ruling and the appellant does not challenge all those grounds in the opening brief, then we may affirm the ruling." *Ziegler v. 3M Co.*, No. 23-3031, 2024 WL 2733222, at *1 (8th Cir. May 28, 2024) (quoting *Rivero v. Board of Regents of Univ. of N.M.*, 950 F.3d 754, 763 (10th Cir. 2020)). At any rate, the district court's *Ex parte Young* holding is correct.

1. As the district court recognized, this suit for injunctive relief against state defendants is exactly the type of action authorized by *Ex parte Young*. Plaintiffs and other would-be assistors are subject to criminal penalties for providing the

voting assistance that they argue Section 208 protects. Attempting to defeat private enforcement in this case, defendants have argued that, even if Section 208 rights can be privately vindicated, that can occur only in an action brought by voters who need assistance and not by their would-be assistors. Br. 31.

To begin, no court has limited Section 208's enforcement in the manner defendants urge. Instead, courts have held that a non-profit organization that assists voters can enforce Section 208, *see, e.g.*, *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 610-612 (5th Cir. 2017), and for good reason. It would substantially hollow the rights provided by Section 208 to insist that individual voters who need assistance must personally file a federal lawsuit despite needing aid with the much more straightforward task of casting a ballot. But in any event, defendants' argument is wholly without merit in an *Ex parte Young* suit.

Plaintiffs here, and not the voters they seek to assist, are the parties directly regulated by Arkansas law and subjected to its criminal penalties of imprisonment up to one year and a fine of up to $2500. Ark. Code Ann. § 7-1-103(a)(19)(C) and (b)(1) (2024); *id.* §§ 5-4-201(b)(1), -401(b)(1). Like the suit in *Ex parte Young*, this action to enjoin enforcement of state law on preemption grounds "[is] nothing more than the pre-emptive assertion in equity of a defense that would otherwise have been available in the State's enforcement proceedings at law." *Virginia Off.*

for Prot. & Advoc. v. Stewart, 563 U.S. 247, 262 (2011) (Kennedy, J., concurring); *see Ex parte Young*, 209 U.S. at 165-166.[2]

2. To be sure, federal courts' equitable power to enjoin unlawful state action "is subject to express and implied statutory limitations." *Armstrong*, 575 U.S. at 327. In *Armstrong*, for example, the Court ultimately found that the federal statute at issue "implicitly preclude[d]" private suits in equity. *Id.* at 328. But as the district court correctly concluded here, nothing in Section 208 or the VRA's remedial scheme suggests that Congress intended to preclude private enforcement. App. 475; R. Doc. 168, at 30; *see also* App. 61-68; R. Doc. 102, at 12-19. Indeed, far from precluding private enforcement, the VRA's statutory text and structure reflect Congress's expectation and encouragement of vigorous private

[2] Contrary to plaintiffs-appellees' framing, the district court did not hold that plaintiffs have a cause of action under the Supremacy Clause. *See* Appellees' Br. 22. And for good reason: while the Supremacy Clause "creates a rule of decision," "instruct[ing] courts what to do when state and federal law clash," the Clause "does not create a cause of action." *Armstrong*, 575 U.S. at 324-325. Instead, as Justice Scalia explained in *Armstrong*, "enjoin[ing] unconstitutional actions by state . . . officers" who are "violating, or planning to violate, federal law" rests on a long-established, judge-made equitable remedy, and does not depend on an "implied right of action." *Id.* at 326-327. The district court here clearly and repeatedly held both that Section 208 of the VRA is directly enforceable through an implied right of action and, moreover, that plaintiffs' suit for declaratory and injunctive relief is proper under *Ex parte Young*. *See* App. 475; R. Doc. 168, at 30; *see also* App. 61-68; R. Doc. 102, at 12-19.

enforcement. *See, e.g.*, 52 U.S.C. 10310(e) (allowing for award of attorney's fees to prevailing parties "other than the United States"); *see also* pp. 19-20, *infra*.

In considering whether a federal statute is enforceable through an *Ex parte Young* suit, courts are to consider whether, as in *Armstrong*, the text of the federal statute at issue is "judicially unadministrable." 575 U.S. at 328. Nothing about Section 208 relies on broad standards that must be balanced through administrative judgment (as with the Medicaid Act provisions at issue in *Armstrong*). Nor is the right to voting assistance granted in Section 208 judicially unadministrable. Instead, these are specific, concrete rights. And, for decades, actions brought both by the United States and private parties have enforced these rights.[3]

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[3] *See, e.g.*, *OCA-Greater Hous.*, 867 F.3d at 610-612; *Disability Rts. Miss. v. Fitch*, 684 F. Supp. 3d 517 (S.D. Miss. 2023); *Disability Rts. N.C. v. North Carolina State Bd. of Elections*, 602 F. Supp. 3d 872 (E.D.N.C. 2022); *Carey v. Wisconsin Elections Comm'n*, 624 F. Supp. 3d 1020 (W.D. Wis. 2022); *Florida State Conf. of NAACP v. Lee*, 576 F. Supp. 3d 974 (N.D. Fla. 2021); *Democracy N.C. v. North Carolina State Bd. of Elections*, 476 F. Supp. 3d 158 (M.D.N.C. 2020); *Nick v. Bethel*, No. 3:07-cv-0098, 2008 U.S. Dist. LEXIS 145456 (D. Alaska July 30, 2008); *United States v. Berks Cnty.*, 277 F. Supp. 2d 570, 580 (E.D. Pa. 2003); *see also* Consent Order, *United States v. Miami-Dade Cnty.*, No. 1:02-cv-21698 (S.D. Fla. June 17, 2002) (requiring County to allow Creole-speaking voters with limited English proficiency to be assisted by the person of their choice pursuant to Section 208); Consent Decree, J., & Order, *United States v. Fort Bend Cnty.*, No. 4:09-cv-1058 (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); Mem. of Agreement, *United States v. Kane Cnty.*, No. 1:07-cv-5451 (N.D. Ill. Nov. 7, 2007) (same); Consent Decree, J., & Order, *United States v. Brazos Cnty.*, No. 4:06-cv-2165 (S.D. Tex. June 29, 2006) (same); Consent Decree, *United States v. Orange Cnty.*, No. 6:02-

C. Section 208 of the VRA is also privately enforceable through Section 1983.

The enforceability of Section 208 through Section 1983 reinforces the propriety of an *Ex parte Young* suit here. A critical factor common to the analysis for both Section 1983 enforceability and an *Ex parte Young* action is whether Congress intended to displace private enforcement. *See, e.g.*, *Armstrong*, 575 U.S. at 327 (holding that the remedial structure and administrative complexity of Section 30A of Medicaid Act establishes Congress's intent to foreclose suits for equitable relief under *Ex parte Young*); *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 172 (2023) (holding, as to rights set out in the Federal Nursing Home Reform Act, that there is "no incompatibility between private enforcement under § 1983 and the statutory scheme that Congress has devised for the protection of those rights").

As explained further below, Congress did not foreclose private enforcement of the rights set out in the VRA. To the contrary, Congress repeatedly made clear that it intended the VRA's substantive provisions, including Section 208, to be privately enforceable.

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cv-737 (M.D. Fla. Oct. 9, 2002) (same); Settlement Agreement, *United States v. City of Philadelphia*, No. 2:06-cv-4592 (E.D. Pa. June 4, 2007) (same); Consent Decree & Order, *United States v. Union Cnty.*, No. 2:23-cv-2531 (D.N.J. June 12, 2023) (same); *see also* Compl., *United States v. Texas*, No. 5:21-cv-1085 (W.D. Tex. Nov. 4, 2021) (challenging assistance limitation ultimately enjoined in parallel proceeding).

"Plaintiffs suing under § 1983 do not have the burden of showing an intent to create a private remedy because § 1983 generally supplies a remedy for the vindication of rights secured by federal statutes." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002). A federal statute is "presumptively enforceable" under Section 1983 if it "unambiguously confer[s]" individual federal rights. *Id.* at 283-284. That standard is met if the statute in question "is 'phrased in terms of the persons benefited' and contains 'rights-creating,' individual-centric language with an 'unmistakable focus on the benefited class.'" *Talevski*, 599 U.S. at 183 (quoting *Gonzaga Univ.*, 536 U.S. at 284, 287).

Section 208 indisputably confers individual rights. It 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. The "special class to be benefited," *Cannon v. University of Chi.*, 441 U.S. 677, 690 (1979), are voters who are blind, have a disability, or are unable to read or write in the language of the ballot, and the statute grants these voters an explicit right to a voting assistor of their choice.

Where "a statutory provision unambiguously secures rights, a defendant 'may defeat t[he] presumption by demonstrating that Congress did not intend' that § 1983 be available to enforce those rights." *Talevski*, 599 U.S. at

186 (quoting *Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 120 (2005)). To rebut the presumption of enforceability, there must either be specific evidence from the statute itself or a comprehensive enforcement scheme that is incompatible with private enforcement under Section 1983. *Gonzaga Univ.*, 536 U.S. at 284 n.4.

Attorney General enforcement and private enforcement of Section 208 are complementary, not incompatible, as multiple courts have held with respect to Section 1983 enforcement of another voting provision, the materiality provision of the Civil Rights Act of 1964, 52 U.S.C. 10101(a)(2)(B). *See Vote.org v. Callanen*, 89 F.4th 459, 473-475 (5th Cir. 2023); *Migliori v. Cohen*, 36 F.4th 153, 159 (3d Cir.), *vacated as moot sub nom. Ritter v. Migliori*, 143 S. Ct. 297 (2022); *Schwier v. Cox*, 340 F.3d 1284, 1296-1297 (11th Cir. 2003).

Moreover, although *Gonzaga* does not require intrinsic textual evidence of Congress's intent that a statute be enforceable under Section 1983 (beyond its intent to confer an individual right), the VRA provides such evidence in abundance.

Section 12(f) of the VRA provides:

> The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to [Section 12 of the VRA] and shall exercise the same without regard to whether *a person asserting rights* under the provisions of chapters 103 to 107 of [the VRA] shall have exhausted any administrative or other remedies that may be provided by law.

52 U.S.C. 10308(f) (emphasis added).

Section 12(f) reflects Congress's intent that federal courts have subject-matter jurisdiction over suits to enforce the VRA's substantive provisions—including Section 208—brought by private plaintiffs, as well as by the United States, when it has been given litigating authority. *Allen v. State Bd. of Elections*, 393 U.S. 544, 555 n.18 (1969) (finding "force" to the argument that Section 12(f) "necessarily implies that private parties may bring suit under the [VRA]").

Section 3 of the VRA similarly reflects Congress's understanding that private plaintiffs can enforce the VRA's substantive provisions—including Section 208—by providing specific remedies to "the Attorney General *or an aggrieved person*" in lawsuits brought "under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. 10302 (emphasis added).

Finally, Section 14(e) of the VRA provides:

> In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, *other than the United States*, a reasonable attorney's fee.

52 U.S.C. 10310(e) (emphasis added).

There is thus overwhelming textual evidence that Congress intended private enforcement of the VRA's substantive provisions. The propriety of Section 1983 enforcement further underscores that there are no obstacles to finding that Section 208 can be enforced via *Ex parte Young* in appropriate cases like this one.

II. The district court correctly held that Section 208 preempts the six-person limitation on voter assistance provided in Arkansas law.

Section 208 of the VRA guarantees voters with disabilities or limited English proficiency the right to an assistor of their choice when voting, subject only to specified exceptions included in the statute. 52 U.S.C. 10508. Arkansas's six-voter limit on assisting voters, *see* Ark. Code Ann. § 7-5-310(b)(4)(B) (2024), conflicts with the federal right that Congress guaranteed to such voters under Section 208. The district court therefore correctly held that Arkansas's six-voter limit on the provision of assistance is preempted by Section 208. This Court should affirm the judgment below.

A. The Supremacy Clause requires preemption of state laws that conflict with the requirements of Section 208.

Under the Supremacy Clause of the U.S. Constitution, a state statute is preempted to the extent it conflicts with federal law. *See* U.S. Const. Art. VI, Cl. 2. State law conflicts with federal law when: (1) it is impossible to comply with both state and federal law; or (2) "where 'under the circumstances of [a] particular case, [the challenged state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Crosby v. National Foreign Trade Council*, 530 U.S. 363, 372-373 (2000) (alterations in original; citation omitted); *see also Pet Quarters, Inc. v. Depository Tr. & Clearing Corp.*, 559 F.3d 772, 780 (8th Cir. 2009).

Again, 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. Section 208 thus gives a voter the right to assistance from "a person of the voter's choice," subject to the exclusions that Congress specified in the text of the statute. When Congress passed Section 208, it expected that Section 208 would preempt state election laws "to the extent that they unduly burden the right recognized in [Section 208], with that determination being a practical one dependent upon the facts." Senate Report 63.

Section 208's language is most naturally read to allow the voter to choose to be assisted by any person who is available and willing to provide assistance, and not otherwise precluded from doing so as the voter's employer or union official. Under Section 208, the permissible restrictions on a voter's choice of assistor are those that Congress provided. With the exceptions of the voter's employer or union representative, Congress passed Section 208 to allow voters to choose any assistor who is available and willing. As such, federal courts have repeatedly held that further state restrictions of a voter's choice of an assistor are preempted. *See, e.g.*, *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 615 (5th Cir. 2017); *Democracy N.C. v. North Carolina State Bd. of Elections*, 476 F. Supp. 3d 158, 235-236

(M.D.N.C. 2020); *Disability Rts. N.C. v. North Carolina State Bd. of Elections*, 602 F. Supp. 3d 872, 878 (E.D.N.C. 2022).

B. Arkansas's six-voter assistance limit impermissibly narrows the right to assistance created by Section 208 and is therefore preempted.

In this case, Section 208 preempts Arkansas's six-voter limit on assistance because that limitation impermissibly narrows the right to assistance that Congress created; it also frustrates the purposes and objectives that Congress intended to advance. *See Crosby*, 530 U.S. at 372-373. Under Arkansas law, a voter who qualifies for Section 208's protections could be denied "assistance by a person of the voter's choice." 52 U.S.C. 10508. More specifically, a voter afforded Section 208's protections cannot choose an assistor who has already assisted six other voters. That scenario is "far from implausible." App. 479, 482-483 (internal quotation marks omitted); R. Doc. 168, at 34, 37-38.

Consider, for instance, a family in which a teenager is fluent in English, but her parents, older siblings, and grandparents are not. Under Arkansas law, the teenager can assist only six of her family members, leaving other family members (or neighbors close to the family) to fend for themselves or find another assistor. In such a scenario, Arkansas law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Crosby*, 530 U.S. at 373. As the Fifth Circuit explained when finding that Section 208 preempted a

Texas law requiring that assistors be registered voters in the same county as the relevant voter, "a state cannot restrict [Section 208's] federally guaranteed right by enacting a statute" that "define[s] terms more restrictively than as federally defined." *OCA-Greater Hous.*, 867 F.3d at 615; *see also Disability Rts. N.C.* v. *North Carolina State Bd. of Elections*, No. 5:21-cv-361, 2022 U.S. Dist. LEXIS 121307, at *13 (E.D.N.C. July 10, 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.'").

Arkansas maintains (Br. 24-25) that Section 208 only guarantees eligible voters assistance from "*a* person of the voter's choice," not assistance from "*any* person of the voter's choice." Thus, Arkansas argues, even if a voter's first-choice assistor is barred from assisting, the voter can simply choose a different assistor. But Arkansas ignores that many (perhaps most) voters covered by Section 208 will have a particular person in mind to assist them, and Arkansas law can operate to prevent such voters from obtaining assistance from that chosen person. In many cases, there could be no one else available to provide much-needed assistance. And even if there were, the voter may not know or trust such would-be assistors. Accordingly, Arkansas's law imposes a burden that is inconsistent with Section 208's guarantee of "assistance by a person of the voter's choice." 52 U.S.C.

10508. Beyond this, however, Arkansas seeks to displace Congress's judgment regarding who should be excluded as an assistor.

To be sure, States can have laws that indirectly impact a voter's choice of assistor. Arkansas notes (Br. 26), for instance, that a Section 208-eligible voter cannot choose as their assistor someone who is incarcerated. But that is the result of the practical unavailability of such an assistor, not principles of conflict preemption, nor the adoption of state laws that directly regulate voter assistors.

In addition, Arkansas incorrectly seeks to import (Br. 29-30) into the Section 208 preemption analysis the Supreme Court's "well-established undue-burden standard" for certain constitutional challenges to election regulations under the First and Fourteenth Amendments. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)). But the issue in this case is not whether Arkansas's statute imposes an unconstitutional burden on the right to vote. Rather, the issue is whether Arkansas law conflicts with and frustrates compliance with federal law. The district court applied the correct legal analysis in answering that question. Moreover, the court undertook a particularized, fact-based analysis of the conflict between state and federal law. Whereas the court enjoined the six-voter assistance limit, it separately concluded, and correctly so, that Arkansas's assistor tracking statute—which simply requires recording the names and addresses of those persons assisting voters—can "operate

harmoniously" alongside Section 208. R. Doc. 168, at 37 (quoting *Craig v. Simon*, 978 F.3d 1043, 1049 (8th Cir. 2020)).

Here, the six-voter limitation cannot operate harmoniously alongside Section 208.[4] Arkansas's response—that its six-voter limit protects its compelling interests in combatting voter fraud and protecting vulnerable voters—is immaterial. Br. 28. Limiting a voter's choice of assistors is inconsistent with the letter and the intent of Section 208, which is to ensure a voter can receive assistance from "a person whom the voter trusts and who cannot intimidate" them as "the only kind of assistance that will make [their vote] fully 'meaningful.'" Senate Report 62. Congress already considered the potential interest in guarding against improper influence by assistors and thus precluded assistance from "the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. 10508. "States are not permitted to limit the right to assistance further." *Disability Rts. N.C.*, 2022 U.S. Dist. LEXIS 121307, at *14.

Regardless of whether the State characterizes its interests as compelling, jurisdictions lack the power to impose further restrictions on the right to choose an

[4] The district court cases that defendants rely on in arguing that there is no conflict between the six-voter assist limit and Section 208 have little persuasive value because they also incorrectly conflate the constitutional undue burden analysis with the standards for conflict preemption. *See Ray v. Texas*, No. 2-06-cv-385, 2008 U.S. Dist. LEXIS 59852, at *19 (E.D. Tex. Aug. 7, 2008); *Priorities United States v. Nessel*, 487 F. Supp. 3d 599, 619 (E.D. Mich.), *rev'd & remanded*, 860 F. App'x 419 (6th Cir. 2021).

assistor beyond those that Congress selected. In this case, Arkansas law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," *Crosby*, 530 U.S. at 372-373 (citation omitted), by altering the considered judgment Congress made in enacting Section 208 and restricting a voter's choice of assistor to individuals beyond those Congress chose to exclude.

CONCLUSION

For the foregoing reasons, the United States respectfully urges this Court to affirm on the issues addressed herein.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i) because it contains 6451 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). In addition, this brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it was prepared in Times New Roman 14-point font using Microsoft Word for Microsoft 365. This brief also complies with Eighth Circuit Rule 28A(h)(2) because the ECF submission has been scanned for viruses with the most recent version of Crowdstrike Endpoint Detection and Response (Version 7.5.17706.0) and is virus-free according to that program.

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Date: August 30, 2024

CERTIFICATE OF SERVICE

I hereby certify that on August 30, 2024, I electronically filed this brief with the Clerk of the Court by using the CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the CM/ECF system. I further certify that, within five days of receipt of the notice that the brief has been filed by this Court, the foregoing brief will be sent by Federal Express, next-day mail, to the Clerk of the Court (10 copies) and to the following counsel of record (one copy) pursuant to Local Rule 28A(d):

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