No. 23-60463

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DISABILITY RIGHTS MISSISSIPPI; LEAGUE OF WOMEN VOTERS OF MISSISSIPPI; WILLIAM EARL WHITLEY; MAMIE CUNNINGHAM; YVONNE GUNN

PLAINTIFFS–APPELLEES,

v.

LYNN FITCH, in her official capacity as Attorney General of the State of Mississippi; MICHAEL D. WATSON, JR., in his official capacity as Secretary of State of Mississippi,

DEFENDANTS–APPELLANTS,

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
No. 3:23-cv-350-HTW-LGI

RESPONSE BRIEF OF PLAINTIFFS–APPELLEES

Counsel on Next Page

LESLIE FAITH JONES
SOUTHERN POVERTY LAW CENTER
111 East Capitol Street, Suite 280
Jackson, Mississippi 39201
(601) 317-7519
leslie.jones@splcenter.org

BRADLEY E. HEARD
SABRINA KHAN
JESS UNGER
SOUTHERN POVERTY LAW CENTER
150 E. Ponce de Leon Avenue, Suite 230
Decatur, GA 30030
(334) 213-8303
bradley.heard@splcenter.org
sabrina.khan@splcenter.org
jess.unger@splcenter.org

AHMED SOUSSI
SOUTHERN POVERTY LAW CENTER
201 Saint Charles Avenue, Suite 2000
New Orleans, Louisiana 70170
(334) 213-8303
ahmed.soussi@splcenter.org

ROBERT MCDUFF
Mississippi Center For Justice
210 E. Capitol St., Suite 1800
Jackson, Mississippi 39201
(601) 259-8484
rmcduff@mscenterforjustice.org

JOSHUA TOM
CLAUDIA WILLIAMS HYMAN
AMERICAN CIVIL LIBERTIES UNION OF MISSISSIPPI FOUNDATION
101 South Congress Street
Jackson, Mississippi 39201
(601) 354-3408
jtom@aclu-ms.org
cwilliamshyman@aclu-ms.org

MING CHEUNG
CASEY SMITH
ARI J. SAVITZKY
SOPHIA LIN LAKIN
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
mcheung@aclu.org
csmith@aclu.org
asavitzky@aclu.org
slakin@aclu.org

GRETA KEMP MARTIN
DISABILITY RIGHTS MISSISSIPPI
5 Old River Place, Suite 101
Jackson, MS 39202
Office: (601) 968-0600
Facsimile: (601) 968-0665
gmartin@drms.ms

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following non-governmental persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Plaintiffs-Appellees:	**Counsel**
• Disability Rights Mississippi • League of Women Voters of Mississippi • Mamie Cunningham • William Earl Whitley • Yvonne Gunn	• Ahmed Soussi • Ari J. Savitzky • Bradley E. Heard • Casey Smith • Claudia Williams Hyman • Greta Kemp Martin • Jess Unger • Joshua Tom • Leslie Faith Jones • Ming Cheung • Robert McDuff • Sabrina Khan • Sophia Lin Lakin • American Civil Liberties Union Foundation • American Civil Liberties Union of Mississippi Foundation • Disability Rights Mississippi • Mississippi Center for Justice • Southern Poverty Law Center
Defendants-Appellants:	**Counsel**
• Lynn Fitch • Michael D. Watson, Jr.	• Anthony M. Shults • Douglas T. Miracle • Justin L. Matheny

- Gerald L. Kucia
- Scott G. Stewart

Non-Appealing Defendants:

- Elizabeth Ausbern
- Gerald A. Mumford

Dated: January 16, 2024

/s/ Leslie Faith Jones
Counsel of Record for Plaintiffs-Appellees

STATEMENT OF ORAL ARGUMENT

Because this appeal involves the straightforward application of longstanding precedents and principles, it is Plaintiffs-Appellees' position that oral argument would not significantly aid the Court in resolving the appeal. *See* Fed. R. App. P. 34(a)(2). If, however, this Court determines that oral argument would assist the Court in resolving the appeal, Plaintiffs-Appellees request to participate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Constitutional Provisions, Statutes, and Rules:

Other Authorities

INTRODUCTION

Congress enacted Section 208 of the Voting Rights Act to ensure that voters with disability, blindness, or language barriers have equal access to the franchise. To achieve that goal, Congress mandated that voters be allowed to rely on a person of their choice—someone the voter trusts—for any assistance they need, rather than being forced to depend on individuals chosen by the state. Since its enactment in 1982, states, including Mississippi, have passed laws tracking Section 208's text, permitting voters to receive assistance from virtually anyone they choose.

Mississippi's newly enacted Senate Bill 2358 ("S.B. 2358") clashes with that established understanding of Section 208, threatening to disenfranchise voters with disabilities and criminalize their assistants. Passed in 2023, S.B. 2358 largely prohibits voters from relying on anyone other than a family or household member or a caregiver to return their ballots. Voters with disabilities are thereby deprived of the right to select a person of their choice to assist them beyond those narrow categories, in direct conflict with the rights guaranteed by Section 208. Those who live alone are at risk of being disenfranchised. Others are forced to choose between relying on someone they do not know or trust or forgoing the vote altogether. Trusted individuals who have long assisted their friends and neighbors with disabilities are now subject to potential criminal prosecution simply for helping to place a sealed ballot in a mailbox.

The district court properly applied this Court's Section 208 precedents and committed no abuse of discretion when it preliminarily enjoined S.B. 2358 to prevent voters with disability, blindness, or language barriers from the risk of being disenfranchised. *See OCA-Greater Houston v. Texas* ("*OCA*"), 867 F.3d 604, 614-15 (5th Cir. 2017).

As to likelihood of success on the merits, Section 208's text is clear: voters covered under the statute are entitled to "assistance by a person of the voter's choice." 52 U.S.C. § 10508. The only specified restrictions are that the assistant must be someone "other than the voter's employer or agent of that employer or officer or agent of the voter's union." *Id.* This specification of those two particular limitations means they are the *only* restrictions that may be imposed on a voter's choice of assistance. *OCA*, 867 F.3d at 614-15. That plain-text interpretation also comports with Section 208's purpose of expanding access to the vote by removing state-imposed constraints on voters' options for assistance.

Defendants offer an atextual and ahistorical interpretation of Section 208, manufacturing an exception for states to impose restrictions on a voter's right to seek assistance. Such an approach is contrary to this Court's precedents, Section 208's clear text and purpose, and the weight of persuasive authority. Indeed, Defendants have not identified a single example of another federal statute that has been interpreted in the way they suggest. They instead depend on policy arguments for

S.B. 2358, all of which are irrelevant to the preemption analysis and seek to second-guess the balance that Congress struck with Section 208.

And as to irreparable harm, S.B. 2358 will deny voters with disabilities their right to choose their preferred assistant and creates a significant risk of their being disenfranchised. Meanwhile, their chosen assistants may be subject to criminal prosecution. Notably, S.B. 2358 diverges from other Mississippi election laws, which largely permit unrestricted assistance at other stages of the voting process. This creates confusion and raises the risk of inadvertent violations. These problems are further compounded by S.B. 2358's vague and undefined terms, which may deter voters from seeking assistance and cause them not to vote at all. Despite two rounds of briefing below and now this appeal, the State has yet to define "family member" or "caregiver."

The balance of the equities and the public interest support affirmance as well. The public interest favors allowing eligible voters to vote regardless of their disability status. The State has no legitimate interest in enforcing a law that conflicts with federal law. Moreover, Defendants' "election integrity" arguments are unsupported by any record evidence of any problems regarding assistance for voters with disabilities. They offer no explanation for how contravening Congress's determination—that voters with disabilities know who to trust to assist them—might serve this supposed "election integrity" interest.

The district court's injunction should not be reversed as overbroad. While the district court blocked S.B. 2358 in connection with the 2023 primary and general elections regardless of voters' disability status, those elections are now over, and Defendants' arguments as to that portion of the order are accordingly moot. Conversely, the remaining, prospective portion of the Court's order, which enjoins Defendants from implementing and enforcing S.B. 2358 to the extent necessary to protect voters covered by Section 208, i.e., voters who are disabled or blind or who have a language barrier, is entirely proper and tracks the language of the statute.

S.B. 2358 places the voting rights of all persons covered by Section 208 at risk. Defendants' assertion that relief should be limited to the specific plaintiffs in the case is especially misplaced given that one of the Plaintiffs, Disability Rights Mississippi, is an agency empowered by federal law to represent all Mississippians with a disability. This Court should affirm the district court's injunction of a state law that unlawfully conflicts with established federal rights, and ensure that Mississippi voters can continue to participate in elections regardless of their disability.

COUNTER-STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion by preliminarily enjoining S.B. 2358 after finding it preempted by Section 208 of the Voting Rights Act of 1965, 52 U.S.C. § 10508, in accordance with this Court's decision in *OCA*, 867 F.3d at 614-15.

2. Whether the district court may enjoin the application of S.B. 2358 to the full extent it is preempted by Section 208, which protects all voters who require assistance due to disability, blindness, or limited ability to read or write.

STATEMENT OF THE CASE

I. SECTION 208 OF THE VOTING RIGHTS ACT

In the 1982 amendments to the Voting Rights Act ("VRA") of 1965, Congress enacted Section 208, 52 U.S.C. § 10508, to set a uniform, federal standard, protecting voters' freedom to choose a person they trust to provide assistance:

> 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.

The VRA further defines "vote" or "voting" as encompassing "all action[s] necessary to make a vote effective." 52 U.S.C. § 10310(c)(1).

Congress enacted Section 208 after determining that voters who are blind, disabled, or unable to read or write "are unable to exercise their rights to vote without obtaining assistance in voting." S. Rep. 97-417, at 62. It found that "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." *Id.* "As a result, people requiring assistance . . . 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." *Id.*

The "only" solution, Congress found, was ensuring voters "have the assistance of a person of their own choice," where the assistant is "a person whom the voter trusts and who cannot intimidate" the voter. *Id*. "To do otherwise would deny these voters the same opportunity to vote enjoyed by all citizens." *Id.*

As Defendants note, Section 208's design was driven in significant part by the National Federation of the Blind, whose concerns and proposals are captured in a letter from Mr. James Gashel to Senator Howard Metzenbaum. Def. Br. at 8. As a basic principle, the Federation advocated that "blind voters should be given free choice in designating voting assistants." *Voting Rights Act: Hearing on S. 53, S. 1761, S. 1974, S. 1992, and H.R. 3112 Before the Subcomm. on the Const. of the S. Comm. on Judiciary* ("Senate Hearings"), 97th Cong. 65 (1983).

The Federation pressed for a national standard because not all states "permit[ted] blind voters to have assistance provided by a friend or other person." *Id.* at 65-66. It explained that state laws limiting a voter's choice of assistance had led to confrontations with elections officials, which deterred participation. *Id.* Additionally, "blind people desiring to vote [did] not do so because their assistants may not meet the specific qualifications of the state's statutes." *Id.*

Forcing voters to rely on limited categories of people chosen by the state was a documented problem in the legislative record. For instance, in Mississippi's Clay County, "illiterate persons were told that they had to use poll workers instead of persons of their choice to assist them in voting." *Extension of the Voting Rights Act: Before the Subcomm. on Civil and Const. Rts. of the H. Comm. on the Judiciary* ("House Hearings"), 97th Cong. 2650 (1982). Similarly, in Holmes County,

Mississippi, the NAACP reported that "illiterate persons [were] denied the right to select someone of their choice to assist them in voting." *Id.* at 2642.

Notably, the Federation also opposed restrictions that a state might characterize as being imposed for the voter's own good. It argued against "overprotective" and "custodial" requirements placed on blind voters in the name of safeguarding them from manipulation. Senate Hearings at 65.

Since the enactment of Section 208, the Fifth Circuit and other courts have held that voters have a right to receive assistance at every step of the voting process from anyone of their choice, subject only to the employer and union exceptions Congress enumerated. *See, e.g.*, *OCA*, 867 F.3d at 615.

II. ABSENTEE VOTING IN MISSISSIPPI

Over 850,000 Mississippians have a disability. ROA.336. People with disabilities disproportionately rely upon absentee voting, as allowed by Mississippi law, because of difficulties with mobility, transportation, and other risks and accessibility barriers associated with in-person voting. ROA.54; Miss. Code Ann. § 23-15-713. In 2020, about 100,000 Mississippians cast an absentee ballot—some in-person, and some by mail. ROA.336, 402-03.

A voter with a disability may need assistance at various points of the absentee process, including requesting, retrieving, reading, marking, or physically sealing and returning their completed absentee ballot. To begin the process, a voter must first

apply for an absentee ballot. Miss. Code Ann. § 23-15-715. Applications must be notarized, but voters with disabilities may have their applications witnessed and signed by any person who is 18 years or older. *Id.* at § 23-15-627.

The absentee ballot itself must also be witnessed. *Id.* at § 23-15-631(1)(c). For a voter with a disability, "the attesting witness may be any person eighteen (18) years of age or older." *Id.* The ballot must be placed in the provided envelope and sealed, with the voter's and the witness's signatures placed along the flap. *Id.* at § 23-15-719(3). The voter must also "subscribe and swear to an affidavit and mail the ballot" to the circuit clerk. *See id*. at § 23-15-719(1). The completed ballot must be returned to the circuit clerk to be counted. *Id.* at § 23-15-637(1)(a).

Other than S.B. 2358, Mississippi does not restrict voters to receiving assistance from select categories of people. For instance, voters who need assistance due to disability, blindness, or inability to read or write are "entitled to receive assistance in the marking" and "in completing the affidavit on the absentee ballot envelope," "by *anyone* of [their] choice other than [a candidate on the ballot or the candidate's family], or the voter's employer, an agent of that employer or a union representative." *Id.* § 23-15-631(1)(f) (emphasis added). Prior to S.B. 2358, the State did not restrict voters from asking a person of their choice to help return a ballot, and Mississippians, including Plaintiff Ms. Mamie Cunningham, have assisted their friends and neighbors cast a ballot for decades. ROA.76.

Separate from S.B. 2358, Mississippi law protects voters from intimidation, fraud, and other improper influence. *See, e.g.*, Miss. Code Ann. §§ 97-13-1, 97-13-37, 97-13-39, 23-15-753.

III. S.B. 2358'S PROHIBITION ON VOTER ASSISTANCE

S.B. 2358 is the only Mississippi law that forces voters to rely on designated categories of people for voting assistance. While other laws generally *permit* voting assistance with narrow exceptions, S.B. 2358 does the reverse—it generally *prohibits* assistance, with vague exemptions. *Cf.* Miss. Code Ann. § 23-15-631(1)(f). Specifically, it provides that "[a] person shall not knowingly collect and transmit a ballot that was mailed to another person," unless the person is: (i) an election official, (ii) a U.S. postal worker, (iii) an individual whose official duties under federal law involve mail transmission, (iv) "a family member, household member, or caregiver," or (v) a common carrier. ROA.333.

Other individuals, such as a voter's close friend or neighbor, are subject to the same penalties as those convicted of voter intimidation—imprisonment of not more than one year and/or a fine of not more than $3,000—for providing assistance. ROA.334.

S.B. 2358 creates confusion for voters and assistants. As Defendants admit, Mississippi law allows a person to help the voter witness, read, and fill out the ballot, sign and seal the envelope, and complete the required affidavit, but makes it a crime

for that same assistant to take the final step of helping the voter submit the completed ballot. Def. Br. at 13-14.

Defendants describe "family members," "household members," and "caregivers" as "broad categories," Def. Br. at 13, but the statute defines none of those terms. In fact, throughout this case Defendants have never defined "family member." A Plaintiff in this case helped a "half second-cousin[]" return a ballot, and it is unclear whether such conduct is permitted. ROA.78. Given the criminal law's vagueness, voters may decide not to vote rather than risk arrest of a relative.

As to the term "caregiver," the State has vacillated between at least three different approaches. Initially, Defendants' briefing below floated a definition used by the American Medical Association ("AMA"): "any relative, partner, friend or neighbor who has a significant personal relationship with, and provides a broad range of assistance for a child or an adult with a chronic or disabling condition." ROA.189. During the preliminary injunction hearing, Defendants backtracked, conceding that "caregiver" is not "defined" and the AMA definition is merely "one identified definition" and that "[t]here are others." ROA.374-75.

Defendants have also suggested that Plaintiffs "comfortably meet" "generally accepted definitions of caregivers," ROA.375, even though Plaintiffs do not provide "a broad range of assistance" to their friends and neighbors as required by the AMA definition. Defendants' brief now simply states that the terms should be given "their

ordinary and natural meaning," without offering any actual definition. Def. Br. at 43.

Even if S.B. 2358 were clear, it provides no exception for Mississippians who live alone with no caregiver, including voters in remote areas who have difficulty leaving home. ROA.77 (describing example of 86-year-old who was unable to physically access her mailbox). A voter's household members may also have disabilities or language barriers of their own, ROA.78, and the voter may have personal reasons not to ask them for help. *See, e.g.*, House Hearings at 2691 (citing elderly voters' reluctance to seek help from family). In short, S.B. 2358 impermissibly limits a voter's choice, potentially disenfranchising them.

IV. PROCEEDINGS BELOW

Plaintiffs commenced this action on May 31, 2023, alleging that S.B. 2358 violates Section 208 of the VRA by restricting voters' right to assistance from a person of their choice. ROA.36. This action was filed on behalf of Plaintiffs Mr. William Earl Whitley, an Army veteran who lost both of his legs to Agent Orange exposure and needs assistance returning his absentee ballot; Ms. Yvonne Gunn and Ms. Mamie Cunningham, who have assisted Mr. Whitley and other friends and neighbors for years; Disability Rights Mississippi ("DRMS"), which is the Protection and Advocacy ("P&A") agency authorized by federal law to pursue legal action on behalf of individuals with disabilities in Mississippi and which has had to

divert time from its critical mission of monitoring abuse and neglect at care facilities in order to provide awareness about S.B. 2358; and League of Women Voters of Mississippi ("LWV-MS"), whose membership consists of person(s) who provide assistance to voters and which has also had to expend resources in response to S.B. 2358. ROA.23-27, 75-103.

Plaintiffs immediately moved to enjoin S.B. 2358 from taking effect on July 1, 2023, to the extent that it restricts the rights of persons protected under Section 208; and to require Defendants to inform voters that those who need assistance due to blindness, disability, or language barriers may continue to seek assistance from any person of their choice. ROA.39-40.

The district court heard Plaintiffs' motion on June 13, 2023, ROA.345, and, after supplemental briefing, held a second hearing on July 24, 2023, ROA.436, 441. On July 25, 2023, the district court issued an "Abbreviated Order" enjoining S.B. 2358, due to the time-sensitive nature of the case in light of the 2023 elections.[1] ROA.338. The court found that Mississippi voters with disabilities are likely to be harmed by S.B. 2358's "broad and vague" prohibition on assistance. ROA.336. It also explained that S.B. 2358 lacks "guideposts as to which individuals may be

[1] Although styled as an "abbreviated" order, the district court provided the factual basis for its decision. ROA.336; *see Realogy Holdings Corp. v. Jongebloed*, 957 F.3d 523, 530 (5th Cir. 2020).

deemed 'family members' or 'household members,'" and, particularly, "caregiver." ROA.337.

After two hearings and two rounds of briefing, the court concluded that it "cannot, from the language of the statute, ascertain whether the individual Plaintiffs who previously have provided assistance to eligible disabled voters for many years clearly meet" the requirements in S.B. 2358. ROA.336-37. It followed the Fifth Circuit's interpretation of Section 208 in *OCA*, which held that voters may seek assistance from "any person they want" subject to the employment-related exceptions Congress created. *See* ROA.335. As to the equities, the district court determined that S.B. 2358 is likely to have a deterrent effect on absentee voting. ROA.336-37.

The court then enjoined Defendants "from applying Senate Bill 2358 in connection with the 2023 primary and/or general Mississippi elections," regardless of the voter's disability status. ROA.338. But the 2023 elections have since concluded, and the court's remaining instruction—that Defendants are enjoined from "implementing or enforcing S.B. 2358"—is limited to "voters who are disabled or blind or who have limited ability to read or write." ROA.338.

Defendants did not attempt to stay the district court's order pending appeal, and, accordingly, the entirety of S.B. 2358 was enjoined for the November 2023 elections in Mississippi.

SUMMARY OF THE ARGUMENT

The district court properly held, under this Court's controlling precedent, that Section 208 preempts S.B. 2358. *OCA*, 867 F.3d at 615. Section 208's text, structure, and purpose—as well as the weight of persuasive authority—all compel the conclusion that a voter may select any person to assist them, subject only to Congress's two employment-related exceptions. 52 U.S.C. § 10508.

Defendants' arguments are fatally flawed for multiple reasons. Their contention that Section 208 preserves a state's authority to impose additional restrictions on voters' rights has no basis in the text and is contrary to Section 208's purpose of enhancing and ensuring uniform access to voting assistance of the voter's choice. Instead, Defendants lean on an imagined distinction between "a person" and "any person," even though this Court—and numerous others—has repeatedly held that "a" and "any" are synonymous in statutory construction. *E.g.*, *United States v. Naranjo*, 259 F.3d 379, 382 (5th Cir. 2001).

Next, Defendants justify S.B. 2358 on policy grounds, which are irrelevant to a preemption analysis, because Congress has already considered the competing interests and decided to prioritize the voter's discretion. *See Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524, 529-31 (5th Cir. 2013) (en banc).

Even assuming Defendants are correct that Section 208 somehow permits "reasonable" intrusions on a voter's rights, Def. Br. at 36, 44, S.B. 2358 is a severe restriction that denies voters the ability to seek assistance from the vast majority of the people around them—and creates a significant risk of disenfranchisement.

The remaining factors favor enjoining S.B. 2358 as to all voters and assistants covered under Section 208, which is necessary to provide relief to Plaintiffs, including DRMS, which is legally mandated to represent all Mississippians with disabilities. Defendants argue that the district court erred by enjoining S.B. 2358 as to all voters in the 2023 elections, but those elections are now over, rendering that argument moot.

STANDARD OF REVIEW

This Court reviews a district court's grant of a preliminary injunction for "abuse of discretion." *Robinson v. Ardoin*, 86 F.4th 574, 586 (5th Cir. 2023). To obtain an injunction, Plaintiffs must demonstrate: (1) a substantial likelihood of success on the merits; (2) irreparable harm if the injunction is not issued; (3) the injunction will not disserve the public interest; and (4) the balance of the equities favors an injunction. *See Janvey v. Alguire,* 647 F.3d 585, 595 (5th Cir. 2011).

The district court's legal conclusions are reviewed *de novo*, and its factual findings are reviewed for clear error. *Robinson*, 86 F.4th at 587. Clear error requires

this Court to have "'the definite and firm conviction,' after reviewing the entire record, that the district court erred." *Id.* (citation omitted).

ARGUMENT

I. SECTION 208 OF THE VRA PREEMPTS S.B. 2358.

As the district court found, Plaintiffs are likely to succeed on the merits of their preemption claim. ROA.337. The Supremacy Clause of the U.S. Constitution gives Congress the "power to preempt state law." *Arizona v. United States*, 567 U.S. 387, 399-400 (2012). Conflict preemption occurs where, as here, a statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.*; *La Union del Pueblo Entero v. Abbott*, 604 F. Supp. 3d 512, 534 (W.D. Tex. 2022) (citing *United States v. Zadeh*, 820 F.3d 746, 751 (5th Cir. 2016)).

Section 208 plainly entitles voters to "assistance by a person of the voter's choice." 52 U.S.C. § 10508. In *OCA,* which controls here, this Court unanimously held that the "unambiguous language" of Section 208 preempted a restriction on voter assistance that is less onerous than S.B. 2358. *See OCA* 867 F.3d at 614. Even if *OCA* were somehow not binding here, the text, context, and purpose of Section 208 all point to one conclusion: voters who need assistance due to disability, blindness, or a language barrier may have an assistant of their choice, subject only to Congress's enumerated exceptions. Defendants' policy arguments are irrelevant

in a preemption analysis because Congress has already balanced those competing considerations and determined that voters must be allowed their preferred assistance.

A. *OCA* resolves this appeal in Plaintiffs' favor.

A straightforward application of controlling precedent disposes of Defendants' appeal. In *OCA*, this Court unanimously held that Section 208 preempted a Texas law that restricted a voter's options for assistance. 867 F.3d at 614-15. Notably, the Texas law is *less* restrictive than S.B. 2358—a fact that Defendants have not disputed—and this Court nevertheless held that the law violated Section 208. *Id.* at 615.

The facts of *OCA* are instructive. Like Mississippi, Texas created additional conditions—beyond those enumerated in Section 208—that must be met before a person can provide assistance. Whereas S.B. 2358 restricted assistance to family or household members and caregivers, Texas required that language assistants must be registered voters in the voter's county. *Id.* at 608. Thus, relative to S.B. 2358, the Texas law preserved a much larger universe of people eligible to assist. The Texas requirement was also easier to satisfy—many people could register to vote—whereas here, one cannot simply become a voter's family or household member or caregiver. Nevertheless, because Texas narrowed a voter's options for assistance beyond those set forth in Section 208, the district court enjoined the restriction. *Id.* at 607.

On appeal, this Court was faced with two competing statutory interpretations. The plaintiffs argued "Section 208 guarantees to voters [the] right to choose any person they want, subject only to employment-related limitations, to assist them throughout the voting process." *Id.* at 614. Texas argued that Section 208 "offer[s] near-unfettered choice of assistance" as it pertains to the physical "act of marking the ballot," but that states may restrict other forms of assistance. *Id.*

This Court sided with the plaintiffs. It held that "[t]he unambiguous language of the VRA resolves the parties' disagreement," and that "the limitation on voter choice expressed in [the Texas law] impermissibly narrows the right guaranteed by Section 208." *Id.* at 615. Thus, contrary to Defendants' assertion that the district court misquoted *OCA*, Def. Br. at 30-31, the district court properly construed the *OCA* decision as adopting the plaintiffs' interpretation of Section 208. ROA.335; *see In re Ultra Petroleum Corp.*, 28 F.4th 629, 640 (5th Cir. 2022) (explaining that reasoning that is "central to the decision" is part of the holding).

Defendants contend that *OCA* is not controlling because it addressed whether the VRA's definition of the term "to vote" encompassed aspects of the voting process beyond the marking of the ballot. Def. Br. at 29-30. But this Court's consideration of the definition of "to vote," which determined whether language assistance triggered Section 208 protection at all, was only a threshold question in

OCA. Determining that language assistance is covered by Section 208, was not and could not have been a sufficient basis for the court to affirm on the merits.

Rather, having resolved the threshold issue, this Court needed to and did decide whether Texas's restriction on *who could serve as an assistant* was permissible. On that issue, plaintiffs argued that Section 208 does not permit states to impose any restrictions beyond those in the text, while Texas argued that its provisions are consistent with Section 208. *See OCA,* 867 F.3d at 614-15. This Court necessarily adopted the plaintiffs' interpretation that no further restrictions are permissible, because had it done otherwise, it would have needed to define the scope of permissible restrictions on the voter's choice. It instead held that Texas's requirement that interpreters be registered voters was "impermissibl[e]" under Section 208, without applying any balancing or line-drawing test, *id.* at 615, as Defendants now invite this Court to do, *see* Def. Br. at 36, or otherwise acknowledging that certain extra-statutory restrictions on voters' choice of assistance might be allowed. *OCA*, 867 F.3d at 615. The *OCA* panel's acceptance of plaintiffs' construction, which was necessary to its resolution of the case, is accordingly binding here. *See United States v. Segura*, 747 F.3d 323, 328 (5th Cir. 2014).

B. Section 208 grants covered voters a right to receive assistance from any person of their choice, subject only to Congress's enumerated exceptions.

Section 208 states that covered voters may obtain assistance from "a person of the voter's choice" except "the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508. Traditional principles of statutory interpretation compel the district court's interpretation: that voters have "a right to seek assistance from 'any person they want,'" subject only to the "two specific exceptions" listed in Section 208. ROA.335 (quoting *OCA*, 867 F.3d at 607). The text alone resolves this appeal, but the structure and purpose of Section 208 and the VRA further support Plaintiffs' position.

Defendants attempt to rewrite the text of Section 208 to include a vague exception for states to impose additional limitations, which would swallow the statute and undermine its purpose. Adopting Defendants' reading not only eviscerates Section 208 but creates untenable ambiguity any time a federal statute uses the indefinite article "a."

1. The plain text of Section 208 creates a nearly unrestricted category of persons who may be chosen to provide assistance.

Statutory interpretation begins with the text. *Bartenwerfer v. Buckley*, 598 U.S. 69, 74 (2023). Unless otherwise indicated, a statute's terms are to be given their

ordinary meaning, that is, how they would be understood in "everyday" usage. *Matter of Thomas*, 931 F.3d 449, 454 (5th Cir. 2019).

Section 208 starts by permitting voters to choose from an unrestricted universe of people to assist. It requires only that the voter's choice be "a person"—not an eligible voter, citizen, family or household member, caregiver, mailperson, election official, or any other narrower category of people that states could conceivably designate. 52 U.S.C. § 10508. No voter seeing the term "a person of the voter's choice" would intuit that virtually all persons other than family and household members and caregivers could be excluded, as S.B. 2358 would require. Rather, ordinary language dictates that a friend, neighbor, coworker, or fellow church member, should all be considered a subset of "person."

Indeed, by default, courts broadly interpret the word "person" in federal statutes to include any individual or entity, except governments. *See Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1862 (2019) (citing the Dictionary Act, 1 U.S.C. § 1). The placement of the word "a" in front of "person" preserves that breadth. *See, e.g., United States v. Hendrickson*, 949 F.3d 95, 98 (3d Cir. 2020) ("The indefinite article has a 'generalizing force' on the noun that follows it." (citation omitted)).

Within that broad universe of "persons," Congress prohibited two narrow and specific categories: "the voter's employer or agent of that employer" or an "officer or agent of the voter's union." 52 U.S.C. § 10508. Section 208's text contains no provision allowing states to carve out additional exceptions. Accordingly, the textual canon of *expressio unius* applies. When Congress "explicitly enumerates certain exceptions to a general [rule], 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) (citation omitted). Here, "Congress only included two categories of excluded assistants in the statutory text, and if Congress intended to exclude more categories, or to allow states to exclude more categories, it could have said so." *Disability Rts. N. Carolina v. N. Carolina State Bd. of Elections*, 602 F. Supp. 3d 872, 878 (E.D.N.C. 2022).

Defendants cannot escape the plain language of the statute. As they acknowledge, S.B. 2358 further "restrict[s] the categories" of persons who can assist, Def. Br. at 41, squarely conflicting with Section 208's command that a voter may choose any person "other than" their employer or union to assist them with voting, including the delivery of a ballot. *See OCA*, 867 F.3d at 614; *see Luna-Garcia De Garcia v. Barr*, 921 F.3d 559, 564 (5th Cir. 2019) (interpreting "other than" to mean "except for"). Indeed, Defendants propose a dizzying array of additional, open-ended restrictions that they wish Section 208 permitted states to

impose, none of which appears in the text. Defendants contend that Section 208 ought to permit states to restrict the definition of a "person" in ways that make "good sense," or ways that "impose[] a minimal burden" on voters, or "serve[] legitimate aims," or "enhance[] . . . participation in democracy," "reasonably regulate[]" voters' rights, "protect[] voters," "promote[] important state aims," or "advanc[e] election integrity." Def. Br. at 35-36, 38, 40-41; *see also* ROA.206, 210 (contending that Section 208 gives states "latitude" and "wiggle room"). But Section 208 grants the right to assistance from "a person of the *voter's* choice," not the *state's* choice. 52 U.S.C. § 10508 (emphasis added).

Defendants say it would be "absurd" if states could not create exceptions to Section 208. Def. Br. at 35. But as discussed below in Section I.C, that is how preemption works. By specifically excluding employers and labor unions from Section 208, "Congress demonstrated its ability to create specific exceptions to [an] otherwise general prescription[]," and it "chose not to draft" an additional, open-ended exception for additional restrictions that states may decide to impose. *See United States v. Alabama*, 778 F.3d 926, 934 (11th Cir. 2015). S.B. 2358 frustrates Congress's decision to prioritize voters' right to assistance of their choice, and this Court should hold it preempted.

2. Section 208's reference to "a person of the voter's choice" is synonymous with "any person of the voter's choice."

Defendants cannot manufacture ambiguity in Section 208's text by pointing to the use of the indefinite article "a" in the phrase "a person of the voter's choice." Def. Br. at 24. They contend that "*a* person" is less capacious than "*any* person" or "*the* person," and therefore Section 208 should be read to permit states additional exceptions. *Id.* That is contrary to circuit precedent and the weight of authority, and Defendants fail to identify a single other statute that has been interpreted in this manner.

Courts have consistently held that the indefinite article "a" ordinarily means "any." *E.g.*, *Naranjo*, 259 F.3d at 382. In *Naranjo*, for instance, "plain language" dictated that "*a* violation" refers to "*any* violation," and a contrary reading would have rendered the indefinite article "superfluous." *Id.* at 382-83.

Indeed, appellate courts "have repeatedly found in prior cases that an indefinite article was purposefully used as a synonym for the word 'any.'" *Alabama*, 778 F.3d at 932-33 (holding that "[t]he plain meaning of the term 'an election' is 'any election.'") (collecting Fifth and Eleventh Circuit cases); *see also Lee v. Weisman*, 505 U.S. 577, 615 n.2 (1992) (Souter, J., concurring) ("[T]he indefinite article before the word 'establishment' is better seen as evidence that the [Establishment] Clause forbids any kind of establishment."); *United States v.*

Franklin, 435 F.3d 885, 889 (8th Cir. 2006) ("[T]he use of the indefinite article 'an' . . . to describe the condition . . . implies that other conditions also are authorized."); *Transamerica Ins. Co. v. South*, 89 F.3d 475, 482 (7th Cir. 1996) (characterizing "any" as a "variant" of "a" and "an"). This Court has even traced the etymology of the word "any" back to "aenig," which is a historical variant of "an." *Comm'r of Internal Revenue v. Kelley*, 293 F.2d 904, 912 n.18 (5th Cir. 1961).

The presumption that "a" means "any" is so strong that even when Congress modifies a statute to change "an" to "any," it does nothing to alter the law's scope. *Garcia v. Sessions*, 856 F.3d 27, 36-37 (1st Cir. 2017). "As a matter of grammar, the word 'any' is not clearly more sweeping than is the word 'an.'" *Id.* Therefore, the First Circuit ruled, changing "an alien" to "any alien" did not broaden the category of people eligible to seek asylum. *Id.* Congress has even revised statutes to refer to "a person" instead of "any person" for the purpose of "eliminat[ing] unnecessary words" without changing the meaning. *See* 49 U.S.C. § 80501; H.R. Rep. 103-180, at 484.

The use of "a" to mean "any" was also ordinary usage when Section 208 was enacted in 1982. *See CREW v. FEC*, 971 F.3d 340, 354 (D.C. Cir. 2020) ("'A' means 'one' or 'any' . . . ; it is more often used in the sense of 'any.'") (collecting dictionary definitions from 1976 to 1980). An example from 1983 further demonstrates this

point—Congress enacted 46 U.S.C. § 10505, which provides that "[a] person may not . . . pay a seaman wage in advance" of their voyage. According to the accompanying House Report, § 10505's reference to "a person" was intended to "prohibit[] *any person* from paying a seaman" any wages. H.R. Rep. 98-338, at 199 (emphasis added). In short, Defendants' focus on "a" versus "any" is a "difference in search of a distinction." *See Roblin v. Newmar Corp.*, 859 F. App'x 171, 172 n.2 (9th Cir. 2021).

Defendants' own cases confirm that there is no material distinction between "a" and "any." Def. Br. at 24. First, they cite *McFadden v. United States*, which explains that "'a' means some undetermined or unspecified particular." Def. Br. at 24 (quoting 576 U.S. 186, 191 (2015)). Defendants then define "any" as "one or some indiscriminately of whatever kind," which is virtually identical in meaning to their definition for "a." *See id.* (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)). In other words, "a" and "any" are *both* of an indefinite nature, and "a" is not more limited due to being an indefinite article, as Defendants contend. *See Garcia*, 856 F.3d at 36 (describing both "a" and "any" as indefinite).

Defendants also argue that "[s]tatutory structure" supports their interpretation, because Section 208 uses "a," "any," and "the" at different points. Def. Br. at 25. However, all three articles are common words, and their simultaneous presence in a

statute is unremarkable. In fact, "a" and "any" are frequently used interchangeably, including when both articles are present in the same statute. *See, e.g.*, *In re Massman*, No. 12-CV-01665, 2013 WL 718885, at 8 (E.D. Mo. Feb. 27, 2013) (interpreting "*a* judgment" to mean "*any* judgment" despite simultaneous references to "*any* state court action[]" and "*any* type"); *Kilroy v. Husted*, No. 11-CV-145, 2011 WL 3321308, at 3 (S.D. Ohio Aug. 2, 2011) (interpreting "an ownership interest" to mean "*any* ownership interest" despite statute's use of "any person" in the same sentence).

Similarly, the use of "the" in a statute does not preclude "a" from having the same meaning as "any." *See Kyles v. J.K. Guardian Sec. Servs., Inc.*, 222 F.3d 289, 295, 297-98 (7th Cir. 2000) (holding that Title VII's language allowing "a person claiming to be aggrieved" to file a claim meant that "any person aggrieved by a violation" could file a charge, because the language "reflect[s] a congressional intent to extend standing to the fullest extent permitted," despite a reference to "the person" elsewhere in statute); *see also* 7 U.S.C. § 21(b)(9) (using "a person" interchangeably with "any person," as well as using "the person" to refer to the same subject).

The fact that the indefinite article "a" has the same "generalizing force" as "any" also explains why Section 208 does not refer to "*the* person of the voter's choice." *See, e.g.*, *Hendrickson*, 949 F.3d at 98-99. Here, if Section 208 had specified

"*the* person of the voter's choice," it could imply that voters may be assisted by only one particular person. *See, e.g.*, *CSX Transportation, Inc. v. Island Rail Terminal, Inc.*, 879 F.3d 462, 471 (2d Cir. 2018) ("The use of the definite article 'the' indicates a singular . . . whereas the indefinite article 'any' or 'a' denotes multiple."); *Dutcher v. Matheson*, 840 F.3d 1183, 1197 (10th Cir. 2016) ("[T]he statute's use of the definite article 'the' supports the idea of focusing the inquiry on the identification of one state.").

Rather, using "a" broadens the category of people who may assist voters. *See Mixon v. One Newco, Inc.*, 863 F.2d 846, 850 (11th Cir. 1989). Thus, *any* person that a voter chooses—subject to employer and union exceptions—would be eligible to assist under Section 208. *Id.* (holding that use of "'*a* period of seven years' as opposed to '*the* period' indicates that *any* seven-year period . . . would suffice").

Defendants rely on *Priorities USA v. Nessel*, 628 F. Supp. 3d 716 (E.D. Mich. 2022), and *Ray v. Texas*, No. 06-CV-385, 2008 WL 3457021 (E.D. Tex. Aug. 7, 2008), neither of which can overcome circuit precedent. Moreover, neither case discusses the principle that "a" is generally synonymous with "any." *Nessel*, 628 F. Supp. 3d at 733; *Ray*, 2008 WL 3457021, at *7. Accordingly, they are of no

persuasive value on this point and should not be followed.[2] No other Section 208 case has interpreted "a person" the way Defendants suggest.[3]

3. Defendants' reading would disrupt not only Section 208's settled interpretation but also numerous other federal statutes.

Defendants contend that, by referring to "a person," Congress intended to "leav[e] States room to reasonably regulate the universe of persons" to whom the statute applies. Def. Br. at 25. Defendants' approach has been rejected by multiple courts, because the use of an indefinite article is too subtle a distinction. If adopted, Defendants' approach would undermine rights conferred by Congress in other statutes and, untenably, invite states to re-write federal legislation whenever Congress refers to "a person," as it often does. Indeed, despite Congress's frequent references to "a person," Defendants have not identified another instance of Congress using an indefinite article to impliedly delegate authority to each state to define the universe of applicable persons (and therefore to narrow the scope of federal law).

---

[2] In any event, "*Ray* pre-dates *OCA-Greater Houston*" and was necessarily overruled to the extent it is inconsistent with Fifth Circuit precedent. *See Arkansas United v. Thurston*, 626 F. Supp. 3d 1064, 1087 n.15 (W.D. Ark. 2022).

[3] *See, e.g.*, *Thurston*, 626 F. Supp. 3d at 1085 ("With the exception of the voter's employer or union representative, Congress wrote § 208 to allow voters to choose any assistor they want."); *Carey v. Wis. Elections Comm'n*, 624 F. Supp. 3d 1020, 1032 (W.D. Wis. 2022) (similar); *Disability Rts. N.C.*, 602 F. Supp. 3d at 877 (similar); *Democracy N.C., v. N. Carolina State Bd. of Elections,* 476 F. Supp. 3d 158, 235 (M.D.N.C. 2020) (similar); *United States v. Berks Cnty.*, 277 F. Supp. 2d 570, 584 (E.D. Pa. 2003) (similar).

First, to the extent that there is any marginal difference between the use of "a" and "any," it cannot support the immense weight that Defendants seek to place on it. Federal courts have rejected this very argument when interpreting Section 208: "The use of the indefinite article 'a' does not show intent by Congress to allow states to restrict a federally created right, for Congress does not 'hide elephants in mouseholes.'" *Disability Rts. N.C.*, 602 F. Supp. 3d at 878 (E.D.N.C. 2022) (quoting *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001)); *see also Arkansas United v. Thurston*, No. 20-CV-5193, 2020 WL 6472651, at *4 (W.D. Ark. Nov. 3, 2020) ("The Court is unconvinced that the use of the indefinite article 'a' evinces an intent by Congress to allow states to limit who may act as a voter assistor under § 208."). And in general, "[f]ederal courts have shown little tolerance for any narrowing of the Section 208 right to assistance with the voting process." *Disability Rts. N.C.*, 602 F. Supp. 3d at 878.

Courts have also repeatedly rejected attempts to narrow other federal statutes based on any supposed distinction between "a" and "any." For instance, the First Circuit held that, "insofar as 'any' might be thought to be somewhat more sweeping than 'an,'" it is unlikely that "Congress used the subtle stratagem of replacing one indefinite article with a different one to signal its unambiguous intent to make an exception to an otherwise categorical bar." *Garcia*, 856 F.3d at 36. That is precisely the situation here—Defendants do not dispute that, but for any subtle distinction

engendered by using "a" in Section 208, the statute bars states from instituting any additional exceptions to the type of "person" that may assist a voter.

Defendants' approach also sets no obvious constraint on the types of exceptions or restrictions that a state could create, whether in Section 208 or any number of similarly worded federal statutes. Their interpretation would result in states having near-unlimited discretion to narrow the scope of federal law whenever the statute places an "a" in front of a noun.

Indeed, if Defendants' arguments were accepted, there could be a cascading effect on other statutes that protect federal rights using similar language and structure. When "determining the meaning of a particular statutory provision," courts often find it "helpful to consider the interpretation of other statutory provisions that employ the same or similar language." *St. Tammany Par., ex rel. Davis v. Fed. Emergency Mgmt. Agency*, 556 F.3d 307, 320 (5th Cir. 2009). Here, Defendants' argument rests on a grammatical point about the usage of indefinite articles, which would be easily generalizable to numerous other statutes that reference "a person."

For instance, the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc-1, and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1, bear several similarities to Section 208. RLUIPA forbids the

imposition of a "substantial burden"[4] on the religious exercise of "a person" residing in an institution, except under specific conditions (when the burden is in furtherance of a compelling interest and is the least restrictive means of furthering that interest). 42 U.S.C. § 2000cc-1.

Like Section 208, RLUIPA uses the "a person" formulation, which, in Defendants' view, means that states would have the right to "reasonably regulate" the universe of persons to which the statute applies. *See* Def. Br. at 25. And like Section 208, RLUIPA has a specific exception, which, in Defendants' view, "left it to the States to adopt further exclusions." *Id.* at 26. And like Section 208, RLUIPA also uses "any" elsewhere in the statute, which, in Defendants' view, means that "a" and "any" are not synonymous. *See id.* at 32-33. Under Defendants' interpretation, states would be able to identify disfavored religious groups—just as S.B. 2358 disfavors a voter's friends and neighbors from handling ballots—and carve them out of RLUIPA's free exercise protections. That cannot be the result intended by Congress.

Defendants' view that "a person" is ambiguous in scope, particularly whenever Congress uses the word "any" elsewhere in the statute, would also lead to absurd interpretations of numerous other statutes. *See, e.g.*, 18 U.S.C. §§ 36, 115,

[4] RLUIPA also demonstrates that Congress knows how to create a burden-based balancing test when it intends to do so.

2282A; 33 U.S.C. § 1481; 42 U.S.C. § 2272. Notably, S.B. 2358 itself imposes criminal penalties on "a person" who violates its terms, even though its exceptions use the phrase "any other person." ROA.333. By Defendants' logic, S.B. 2358's reference to "a person" is indefinite and ambiguous, and not every violator of S.B. 2358 necessarily comes within its sweep.

In short, Defendants' preferred reading of Section 208 is incompatible with traditional principles of statutory interpretation and creates a world where Congress implicitly leaves statutory terms undefined—for each state to fill in as they see fit—simply by placing an "a" in front of a noun. That position undermines the uniformity of federal law, creates uncertainty throughout the federal code, and must be rejected.

4. Defendants' interpretation of Section 208 is inconsistent with its purpose.

Section 208 was enacted as a part of the VRA, whose "purpose was to create a guaranteed right to the voting process that could not be narrowed or limited by state legislation." *Disability Rts. N.C.*, 602 F. Supp. 3d at 879. In 1982, Congress determined that voters who are blind, have a disability, or who are unable to read or write "must be permitted to have the assistance of a person of their own choice," because that "is the only way to assure meaningful voting assistance." *Id.* at 880 (citing S. Rep. 97-417, at 240-41).

Otherwise, such voters may be deterred from voting or be forced to rely on someone they do not trust. *E.g.*, *Arkansas United v. Thurston*, 626 F. Supp. 3d 1064, 1071, 1076 (W.D. Ark. 2022). Section 208's specific purpose, therefore, was "to ensure those who required assistance . . . received the assister of their choice." *Id.* The legislative history also confirms that Congress intended for its employer and union-related exceptions to be exclusive and narrow. *See* S. Rep. 97-417 at 64 (explaining that employer and union exceptions do not bar "assistance by a voter's co-worker, or fellow union-member").

In direct conflict with that history and purpose, Defendants describe their view of Section 208 as "establish[ing] a floor of persons who *may not assist* a voter, not a ceiling." Def. Br. at 34 (emphasis added). Under Defendants' reading, the only practical effect of Section 208 would be to prevent employers and unions from assisting voters, while preserving the states' existing ability to regulate other sources of assistance. Defendants therefore interpret Section 208 in reverse: to affirm the *state's* authority to regulate voters' ability to seek assistance, even though the statute is designed to protect *voters'* rights from state interference. *See Disability Rts. N.C.*, 602 F. Supp. 3d at 880 ("The legislative history shows that Congress' intent in enacting Section 208 was to protect the choice of vulnerable citizens and give them meaningful access to the vote. This does not support defendants' contention that

states may further limit voters' choice of assistant and burden their access to the voting process.").

Defendants' attempt to rely on legislative history fails. Not only is the state's preferred exception for "reasonable regulations" absent from the text of Section 208, such language is also absent from the legislative history they cite. Def. Br. at 26 (citing S. Rep. 97-417 at 62-63). In any event, legislative history cannot overcome the statute's clear text. *Hoyt v. Lane Constr. Corp.*, 927 F.3d 287, 294 (5th Cir. 2019).

C. Federal law preempts conflicting state law regardless of a state's policy justifications.

Federal law preempts any state law that "stands as an obstacle to the accomplishment and execution" of Congress's "full purposes and objectives." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). Defendants cannot circumvent the Supremacy Clause by arguing that: (1) Mississippi has a "compelling interest" in combatting voter fraud, Def. Br. at 5; (2) S.B. 2358 is immune to conflict preemption because it is an election or criminal statute, Def. Br. at 4; or (3) S.B. 2358 "enhances, rather than limits" other "citizens' participation in democracy," Def. Br. at 40, because these arguments are irrelevant to whether S.B. 2358 creates an obstacle to Congress's purposes of ensuring covered voters can obtain assistance.

First, Congress's purpose—not Mississippi's—drives the preemption inquiry. *Hines*, 312 U.S. at 67; *Zadeh*, 820 F.3d at 752. Defendants err by citing *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2348 (2021), Def. Br. at 47, because it did not deal with conflict preemption or Section 208.

Second, Defendants note that states have power to regulate elections and crime. Def. Br. at 27-28. But Congress can, and does, preempt election and criminal statutes, as this Court held that it did in *OCA*, 867 F.3d at 615. *See also, e.g., Arizona v. Inter-Tribal Council of Arizona, Inc.* ("*ITCA*"), 570 U.S. 1, 15 (2013); *Fish v. Schwab*, 957 F.3d 1105, 1144 (10th Cir. 2020); *Villas,* 726 F.3d at 528-29.

Third, Defendants cannot avoid preemption by claiming that S.B. 2358 serves one of the purposes of Section 208. Because "a state law is also preempted if it interferes with the methods by which the federal statute was designed to reach that goal," "it is not enough to say that the ultimate goal of both federal and state law is the same." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 103 (1992) (cleaned up). As discussed above, Congress determined that the "only" way to protect voters from improper influence is to guarantee their ability to rely on a person of their choice. S. Rep. 97-417, at 62. Defendants cannot circumvent Congress's chosen approach by merely contending that their interests align with Congress's goals, Def. Br. at 38. *Villas*, 726 F.3d at 528 ("The fact of a common end hardly neutralizes conflicting means." (cleaned up)).

This Court should also decline Defendants' invitation to adopt either an undue burden or a reasonableness test. *See* Def. Br. at 10, 18, 24, 26. No such test appears in Section 208's text, and it is not part of any preemption analysis: this Court in *OCA* held that a state law was preempted by Section 208 without applying an undue burden or reasonableness test. *OCA*, 867 F.3d at 615. Multiple other courts have also done so. *Disability Rts. N.C.*, 602 F. Supp. 3d 872, 877-79 ("[T]here is nothing in the statutory language to suggest that a state may burden, unduly or otherwise, the right [to choose] articulated in § 208.") (citation omitted); *see also Carey v. Wis. Elections Comm'n*, 624 F. Supp. 3d 1020, 1033 (W.D. Wis. 2022); *Thurston*, 626 F. Supp. 3d at 1084.

Defendants selectively cite Section 208's Senate Report as creating an undue burden test. Def. Br. at 10. As the court held in *Thurston*, that language may "suggest[] that some state legislation on the topic of voter assistance is permissible," but it "does not extend as far" as to create an undue burden test for narrowing a voter's choice. 626 F. Supp. 3d at 1087. That is because "[d]irectly 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,'" which means that "the one thing states cannot do is disallow voters the assistor of their choice." *Id.* (quoting S. Rep. No. 97-417 at 63).

The sole line of legislative history on which Defendants rely cannot erase the fact that S.B. 2358 conflicts Section 208's clear text. *See Geier v. Am. Honda Motor Co*., 529 U.S. 861, 884 (2000). Because "undue burden" is not the applicable standard under either Section 208 or the relevant preemption analysis, Defendants' claim that S.B. 2358 only imposes "minimal burdens" is irrelevant. Def. Br. at 36-38.

D. In practice, SB 2358 does impose an undue burden on the right to voting assistance.

Alternatively, even if undue burden were the standard, S.B. 2358 does not survive. S.B. 2358 turns Section 208's broad right to assistance into a narrow one, only permitting assistance from household members, relatives, caregivers, or certain mail carriers. As discussed above, S.B. 2358 is more burdensome than the law struck down in *OCA*, where Texas required interpreters to be registered voters in the voter's county. 867 F.3d at 608.

Even the Senate Report on which Defendants rely confirms that any restriction on a voter's choice of assistance must be preempted. Def Br. at 10. The Committee emphasized that states may only pass "voter assistance procedures" in a "manner which encourages greater participation in our electoral process." S. Rep. 97-417 at 63. And, no matter what process a state chooses to implement, "at the least," the voters covered by Section 208 "are entitled to assistance from a person of their own choice." *Id.*

The Committee indicated that even Section 208's own restrictions on voter choice should be construed narrowly and ought not to prevent coworkers from assisting. *See id.* at 64. The Report explained that the statute's employer-based restriction should not apply in communities with "very few employers," because such a "burden on the individual's right to choose a trustworthy assistant would be too great." *Id.* In comparison, S.B. 2358 is far more restrictive, denying voters the ability to rely on the vast majority of the people in their community, not just their employers or co-workers. S.B. 2358, by forbidding voters from relying on friends and others they trust, is the kind of state restriction that the National Federation of the Blind sought to override with a federal standard. *See* Senate Hearings at 65-66.

Further, Plaintiffs have provided ample evidence that S.B. 2358 creates an undue burden by unnecessarily denying assistance to voters with disabilities. *See, e.*g., ROA.96-99; ROA.85-87.[5]

Take Mr. Whitley. He has lost both of his legs, so he relies on Ms. Gunn, someone he knows and trusts from his church, with returning his ballot. ROA.96-99. Ms. Gunn does not live with Mr. Whitley and is not related to him, so S.B. 2358

[5] In *Nessel*, 628 F. Supp. 3d at 733, a case Defendants cite for a different point, Def. Br. at 25, the court declined to enjoin a state restriction after finding no evidence that the law actually denied assistance to voters. *Priorities USA v. Nessel*, 487 F. Supp. 3d 599, 619-20 (E.D. Mich 2020). Similarly, in *Ray*, 2008 WL 3457021, at *5-6, where the court held that a restriction on the number of times a person can assist was reasonable, it found the plaintiffs had not shown evidence of denial of assistance. Both cases are distinguishable, because Plaintiffs have shown such harms. *See Democracy N.C.*, 476 F. Supp. 3d at 235 (rejecting *Ray*, 2008 WL 3457021, as "inapposite"). Neither case can overcome *OCA*, which did not apply an undue burden test. 867 F.3d at 614-15.

creates a significant risk that Mr. Whitley, who has no access to Mississippi-approved assistants, may not be able to vote. *Id*.

Additionally, many of DRMS's constituents live in congregate settings, like nursing homes and long-term care facilities, where staff handle the mail. ROA.85-87. S.B. 2358, given its vagueness, chills staff members from assisting, and risks disenfranchising residents who cannot return their ballots on their own. ROA.85-87.

Defendants nowhere dispute that S.B. 2358 disenfranchises Plaintiffs or their constituents. Instead, Defendants call S.B. 2358 a "minimal burden," because, they say, voters can get assistance with *other* steps of the voting process, like filling out and signing a ballot. Def. Br. at 37-38. Defendants' argument is baffling: Marking a ballot is not a substitute for returning a ballot. *See* S. Rep. No. 97-417, at 63 (explaining that a state may not "deny . . . assistance at some stages of the voting process during which assistance was needed").

For someone like Mr. Whitley, who does not have a family member, household member, or caregiver who can assist, Defendants suggest that they instead "arrange collection of a completed ballot" by a mail carrier. Def. Br. at 38. Defendants' suggestion here proves Plaintiffs' point. A state forcing a voter covered under Section 208 to *specifically* choose their postal worker to assist them in voting—where Congress has guaranteed them the right to "assistance by a person of

[their] choice," 52 U.S.C. § 10508—creates a "direct[] conflict" with federal law. *See Voting Integrity Project, Inc.*, *v. Bomer,* 199 F.3d 773, 775 (5th Cir. 2000).

Regardless, forcing Mr. Whitley to rely on a mail carrier to personally visit him to pick up his ballot because he cannot access a mailbox, ROA.97—when the person he trusts with his ballot is available to do so, ROA.98—is an undue burden. Defendants would require Mr. Whitley to either pay a carrier fee to cast his ballot or be at the mercy of his postal worker—the kind of dependence that Congress sought to prevent with Section 208. For those covered voters who are unable or unwilling to rely on state-designated assistants, the operation of S.B. 2358 would "deny the assistance" that is needed—a circumstance specifically prohibited by the Senate Report relied upon by Defendants. S. Rep. 97-417, at 63.

Worsening this burden, the State has not defined "caregiver" and, as discussed, offered varying definitions of the term in the briefing below and during oral argument. ROA.336, 375. Indeed, the district court explained that, due to the vagueness of S.B. 2358, it "could not ascertain whether the individual Plaintiffs who have previously provided assistance to eligible disabled voters for many years clearly meet" S.B. 2358's exceptions. ROA.337. If a court cannot ascertain the scope of the term "caregiver" after two hearings and several rounds of briefing, and Defendants also cannot commit to a definition even after appealing to this Court, *see*

Def. Br. at 43, Mississippi voters with disabilities and language barriers cannot reasonably be required to guess its meaning as a condition of voting.[6]

Finally, the state's purported policy arguments for burdening voters with S.B. 2358 are unfounded. Contrary to Defendants' suggestion that voters would be unprotected from threats and manipulation, multiple federal laws guard against intimidating, threatening, coercing a voter, interfering with their vote, or preventing a voter from voting for a candidate of their choice. 18 U.S.C. §§ 245, 594; 42 U.S.C. § 1985; 52 U.S.C. §§ 10307, 20511. States are also free to enact similar protections against threats and improper influence, as Mississippi has done. *See, e.g.*, Miss. Code Ann. §§ 97-13-1, 97-13-37, 97-13-39, 23-15-753.

II. THE REMAINING FACTORS FAVOR ENJOINING MISSISSIPPI FROM ENFORCING S.B. 2358 TO THE EXTENT IT VIOLATES SECTION 208 OF THE VRA.

The district court did not abuse its discretion in finding that Plaintiffs will suffer irreparable harm absent an injunction, and that the equitable factors favor enjoining the application of S.B. 2358 to any voter who needs assistance (due to

[6] Requiring voters to individually challenge S.B. 2358 to obtain relief, as Defendants suggest, Def. Br. at 44, frustrates the purpose of Section 208 and would also create an undue burden on voting. Congress could not have intended for voters—who are unable to physically return a ballot without assistance and are therefore in need of Section 208's protection—to each file a lawsuit in federal court before they can receive assistance with the simple act of returning a ballot.

disability, blindness, or a language barrier) and the voter's chosen assistant. ROA.337.

S.B. 2358 will irreparably harm Plaintiffs in a multitude of ways, including through denial of voting assistance (and the related burden on the right to vote), risk of criminal prosecution, and diversion of resources from crucial organizational missions to assist Mississippians with disabilities. The balance of equities also weighs against Defendants' efforts to enforce a state statute that violates federal law. Indeed, Defendants' notable lack of urgency in appealing the district court's injunction despite the then-impending November 2023 elections demonstrates that S.B. 2358 does not serve any legitimate purpose.

First, Defendants do not dispute that S.B. 2358 irreparably harms voters like Mr. Whitley (and others assisted by Ms. Cunningham and Ms. Gunn), who will be denied a person of their choice to provide voting assistance. *See* ROA.213 (Defendants arguing that only "[c]ertain Plaintiffs cannot demonstrate irreparable harm"). Section 208 protects a voter's right to vote, which "is undeniably a fundamental constitutional right, the violation of which cannot be adequately remedied at law or after the violation occurred." *Mi Familia Vota v. Abbott*, 497 F. Supp. 3d 195, 219 (W.D. Tex. 2020) (citing *Reynolds v. Sims*, 377 U.S. 533, 554 (1964)). "[O]nce the election occurs, there can be no do-over and no redress."

League of Women Voters of N.C. v. North Carolina, 769 F.3d 224, 247 (4th Cir. 2014).

Defendants instead argue that *some* absentee voters in Mississippi may still be able to receive assistance and vote despite S.B. 2358. Def. Br. at 48-49 (claiming that some voters "do not need assistance" or may decide to rely on a family or household member or caregiver). But the possibility that S.B. 2358 does not disenfranchise *even more* voters cannot defeat Plaintiffs' showing of irreparable harm. *See* ROA.403 (Defendants acknowledging that they do not know how many absentee voters need assistance and could be harmed by S.B. 2358). For instance, in *OCA*, presumably not every voter required assistance from someone who is not a registered voter in the county, and that did not preclude the issuance of an injunction. *See* 867 F.3d at 608.

Defendants also argue that only one Plaintiff, Mr. Whitley, is a covered voter, but that overlooks DRMS's statutory role in representing the rights of all Mississippians with a disability. ROA.82. While injuries to Mississippi voters alone are sufficient, Plaintiffs have also shown that DRMS and LWV-MS have sustained injuries to their organizational missions through the diversion of resources because of S.B. 2358. For instance, DRMS and LWV-MS had to create additional

educational materials and devoted resources to warn voters and assistants about the ambiguous definition of "caregiver." ROA.88-89, 102-03.

DRMS has even been forced to forgo monitoring time-sensitive allegations of abuse and neglect at care facilities to educate voters on the new law. ROA.89. These injuries, like those suffered by the organizational plaintiff in *OCA*, constitute irreparable harm. 867 F.3d at 612; *see also Common Cause Indiana v. Lawson*, 937 F.3d 944, 953-55 (7th Cir. 2019) (holding that an organizational plaintiff is injured even when the burden inflicted by Defendants' conduct takes the form of additional work related to the plaintiff's mission).

Third, Plaintiffs have further shown that Ms. Cunningham, Ms. Gunn, and LWV-MS members who seek to continue providing voting assistance to members of their community will also be irreparably harmed by the threat of being prosecuted under S.B. 2358. ROA.80, 94, 103; *see Ga. Latino All. for Hum. Rts. v. Governor of Ga.*, 691 F.3d 1250, 1269 (11th Cir. 2012). The harm to assistants cannot be remedied because the opportunity to vote and to assist are lost forever post-election. *See Ind. State Conf. of NAACP v. Lawson,* 326 F. Supp. 3d 646, 663-64 (S.D. Ind. 2018), *aff'd sub nom. Lawson*, 937 F.3d 944 (7th Cir. 2019).

The balance of the equities and the public interest favor allowing more eligible voters to vote and enjoining S.B. 2358 to the extent it violates Section 208.

See Obama for Am. v. Husted, 697 F.3d 423, 437 (6th Cir. 2012) (holding that the public interest favors "permitting as many qualified voters to vote as possible"). Even if Defendants could show harm from S.B. 2358's injunction, which they cannot, Mississippi may not advance its interests by violating federal law. *See Ingebretsen on behalf of Ingebretsen v. Jackson Public Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996) (where an enactment is unconstitutional, "the public interest [is] not disserved by an injunction preventing its implementation"); *see also Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) ("[A] state is 'in no way harmed by the issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional.'" (citation omitted)). The "[f]rustration of federal statutes and prerogatives [is] not in the public interest." *United States v. Alabama*, 691 F.3d 1269, 1301 (11th Cir. 2012).

Defendants nonetheless claim injury because they cannot "enforce [their] duly enacted plans," and that S.B. 2358 is an "important" law. Def. Br. at 1, 46. But Defendants' lack of urgency on appeal undermines their position. *See Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) ("The applicants' delay in filing their petition and seeking a stay vitiates much of the force of their allegations of irreparable harm."); *Dillard v. Sec. Pac. Corp.*, 85 F.3d 621 (5th Cir. 1996) (similar). Here, Defendants did not request a stay of the injunction; nor did they seek a clarification that the order, as applied to the 2023 elections, should be tailored to the

scope of Section 208. Instead, Defendants waited until the last moment to notice an appeal, before seeking an extension of their brief, effectively conceding that S.B. 2358 would have no effect whatsoever during the pendency of this appeal, including for the entire duration of the November elections.

Defendants also hypothesize that a "murderer," a "sexual predator," "a serial election fraudster out on parole," or "a random stranger" could be asked to handle a ballot. Def. Br. at 35. That argument cannot justify S.B. 2358. First, under Mississippi's laws, virtually anyone can help a voter mark their selections on their absentee ballot. Miss. Code Ann. § 23-15-631(1)(f). Thus, even with arguably the most sensitive step of the voting process—the actual selection of one's preferred candidates—Mississippi defers to the voter's judgment and does not claim that voters with a disability need to be protected from choosing someone untrustworthy. Yet, when it comes to the simple act of mailing a completed and sealed ballot, Defendants claim the need to second-guess the voter's ability to identify someone they trust. Def. Br. at 35. Moreover, S.B. 2358 does not in fact prevent "murderer[s]" or "sexual predator[s]" from handling a ballot, Def. Br. at 35—under S.B. 2358, even a "serial election fraudster" could return a ballot if they live in the same household as the voter.

Enjoining S.B. 2358 does not, as Defendants argue, deny the State the power to legislate against "the risks of fraud, undue influence, manipulation, or other dangers to public welfare." Def. Br. at 35. Rather, as discussed above, numerous federal and state laws already prohibit voter intimidation and other interference. Section 208 merely prevents the State from restricting and second-guessing the voter's choices as to who to trust. Indeed, while Defendants claim that S.B. 2358 is needed to prevent fraud, they have not identified any evidence in the record (or any other reason to believe) that fraud is likely to occur due to allowing voters to choose someone they trust to handle their ballot. *See* Def. Br. at 39. Thus, enjoining S.B. 2358 does not harm election integrity and in fact enhances the legitimacy of elections in the state by allowing more eligible voters to vote.

III. ENJOINING S.B. 2358 AS TO ALL PERSONS PROTECTED BY SECTION 208 IS NOT AN ABUSE OF DISCRETION.

The district court's order properly enjoins Defendants "from implementing or enforcing S.B. 2358 to the extent that it would prohibit voters who are disabled or blind or who have limited ability to read or write from receiving assistance from the person of their choice." ROA.335. That prohibition tracks Section 208's language and the relief sought by Plaintiffs. Plaintiffs have standing to seek such injunctive relief, which is necessary to redress their injuries. The Court should therefore affirm

the injunction against S.B. 2358 to the full extent of its conflict with Section 208. *See NCNB Texas Nat. Bank v. Cowden*, 895 F.2d 1488, 1494 (5th Cir. 1990).

Defendants contend that a portion of the district court's order is overbroad because it enjoined the entirety of S.B. 2358 for purposes of the 2023 elections. Def. Br. at 3, 49-50. But the 2023 elections are now over, and reversing that portion of the injunction cannot undo the fact that S.B. 2358 had no effect during the last election cycle. Defendants' arguments are therefore moot, and there is no basis to reverse the district court's order as to the 2023 elections. *See Smith v. Edwards*, 88 F.4th 1119, 1124 (5th Cir. 2023) ("Generally, when an injunction expires by its own terms, it is moot and there is nothing to review." (citation omitted)); *Gjertsen v. Bd. of Election Comm'rs of City of Chicago*, 751 F.2d 199, 201-02 (7th Cir. 1984) (holding that appeal of preliminary injunction was moot because "the [election] is over and done with").

A. Plaintiffs may seek injunctive relief against the application of S.B. 2358 to all persons covered by Section 208 of the VRA.

Defendants rightfully do not contest Plaintiffs' standing. Both the individual and organizational Plaintiffs will suffer an array of injuries absent a preliminary injunction. *OCA*, 867 F.3d at 610. The scope of those injuries demonstrates why an injunction that protects all persons covered by Section 208 was proper and not an abuse of discretion.

First, in addition to the injuries to the individual Plaintiffs, who will either be denied Section 208's right to assistance or threatened with prosecution, DRMS and LWV-MS have organizational standing to seek broader relief. S.B. 2358 impedes their ability to conduct voter education and protect the rights of Mississippians with disabilities. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Both DRMS and LWV-MS have had to divert additional resources to educate members and constituents about S.B. 2358. *See* ROA.87-89; ROA.102-03; *OCA*, 867 F.3d at 611-12 (concluding voter education group had standing based on resources diverted to "mitigating" challenged law's effects). That diversion of resources negatively impacts Plaintiffs' other organizational responsibilities, such as DRMS's investigations of abuse and neglect at care facilities. ROA.89. An injunction limited to the individual Plaintiffs would not remedy these organizational harms, because DRMS and LWV-MS would have to continue expending resources to educate other voters and members in response to S.B. 2358.

The organizational Plaintiffs have also established associational standing, to seek injunctive relief based on injury to their members or constituents. *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Associational standing exists when an organization's "members would otherwise have standing to sue in their own right," "the interests it seeks to protect are germane to the organization's purpose," and "neither the claim asserted nor the relief requested requires the participation of

individual members."[7] *Ass'n of Am. Physicians & Surgeons, Inc. v. Texas Med. Bd.*, 627 F.3d 547, 550 (5th Cir. 2010) (quoting *Hunt v. Wash. St. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

As Mississippi's P&A, DRMS is federally authorized to pursue legal action on behalf of all Mississippians with disabilities. 42 U.S.C. § 15043(a)(2)(A)(i). A P&A has associational standing where at least one "constituent" has been harmed. *See, e.g.*, *Doe v. Stincer*, 175 F.3d 879, 885-86 (11th Cir. 1999); *Advoc. Ctr. for Elderly & Disabled v. La. Dep't of Health & Hosps.*, 731 F. Supp. 2d 583, 595-96 (E.D. La. 2010). For a P&A, constituents, i.e., individuals with disabilities residing in the state, "are the functional equivalent of members for the purposes of associational standing," so long as they "participate in and guide the organization's efforts" and play "a critical role in the organization's control, direction, and activities."[8] *Advoc. Ctr. For Elderly & Disabled*, 731 F. Supp. 2d at 594-96 (collecting cases). DRMS's constituents provide the requisite "oversight and

[7] Congress has allowed P&As to sue on behalf of their members in cases that would otherwise "require[] participation of individual members." *J.R. by Analisa R. v. Austin Indep. Sch. Dist.*, 574 F. Supp. 3d 428, 436 (W.D. Tex. 2021). In addition, no individual participation is required because Plaintiffs seek injunctive relief. *Id.*; *see also Warth*, 422 U.S. at 515.

[8] Previously, "disabled people [were] unable to participate in and guide" P&As' activities, prompting this Court to find that a P&A lacked associational standing. *Ass'n for Retarded Citizens of Dallas v. Dallas Cnty. Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994). In 1994, however, Congress enacted a requirement that P&As include people with disabilities on their boards; since then, courts have held that P&As have associational standing to litigate on behalf of their constituents. *Advoc. Ctr. For Elderly & Disabled*, 731 F. Supp 2d at 595-96 & n.63.

control" over the agency. ROA.82-83. Accordingly, to remedy the harm to DRMS and its constituents, the injunction must preserve the right of all Mississippi voters with disabilities to seek their chosen assistants.

B. An injunction against S.B. 2358 to the extent of its conflict with Section 208 of the VRA is not overbroad.

The district court did not abuse its discretion by enjoining Defendants from using S.B. 2358 to restrict assistance for "voters who are disabled or blind or who have limited ability to read or write," ROA.335.

First, in preemption cases, courts enjoin enforcement of conflicting state laws against persons similarly situated to the plaintiff, even without class certification. For example, in *ITCA*, the Supreme Court held that the NVRA preempted Arizona's requirement of documentary proof of citizenship during voter registration. 570 U.S. at 20. The Supreme Court barred Arizona from requesting the additional proof from *any* applicant—not just the individual parties to the case. *Id*.

Defendants' argument that Plaintiffs did not file a class action also fails. Def. Br. at 52. A class action is "unnecessary" in voting cases such as this one, where "the nature of the rights asserted require that the injunction run to the benefit of all persons similarly situated." *Fish v. Kobach*, 318 F.R.D. 450, 454-55 (D. Kan. 2016) *aff'd* 840 F.3d 710 (10th Cir. 2016). In this context, courts routinely enjoin state laws as to either all voters in the state or to groups of impacted voters, without requiring

class certification. *See*, *e.g.*, *League of Women Voters of N.C.*, 769 F.3d at 248; *Obama for Am.*, 697 F.3d at 437.

In contending otherwise, Defendants misapply *OCA*, 867 F.3d at 616. Def. Br. at 52. *OCA* vacated an overbroad injunction because the district court enjoined provisions of the Texas Election Code that were unrelated to the plaintiffs' injuries and had not been challenged by the plaintiffs. *Id.* at 615. Here, Plaintiffs have expressly challenged S.B. 2358, which harms Plaintiffs and their members, and the district court did not enjoin the operation of any other statute. Notably, on remand, the injunction in *OCA* was not limited to the lone individual voter in the case—Texas's restriction on language assistance was enjoined as to all voters. *OCA-Greater Houston v. Texas*, No. 15-CV-679, 2018 WL 2224082, at *4-5 (W.D. Tex. May 15, 2018).

Defendants also rely on *Scott v. Schedler,* Def. Br. 51-52, in which an injunction was vacated as overly vague under Rule 65(d)(1). 826 F.3d 207 (5th Cir. 2016). But Defendants have never contended that the district court's order is vague. The court spoke clearly in enjoining Defendants from implementing or enforcing S.B. 2358 as to persons protected under Section 208. ROA.338; *cf. Scott*, 826 F.3d at 213 ("The district court . . . may not issue an injunction that references other documents or is written in terms too vague to be readily understood.").

Defendants speculate that some voters may not need an injunction because they "might choose to vote in person" or "may choose to receive assistance" from a household or family member. Def. Br. at 51. But Section 208 protects the "voter's choice." 52 U.S.C. § 10508. The possibility that a voter may decide not to exercise their right does not mean that they should not have the right to do so should the need arise. By Defendants' logic, no voting law could ever be enjoined, because any voter might decide not to vote at all—that cannot be the case.

Even if some non-parties unrelated to DRMS and other Plaintiffs happen to benefit from the injunction, such benefits are merely "incidental" and permissible under equitable principles. *Bosarge v. Edney*, No. 22-CV-233, 2023 WL 2998484, at *12-13 (S.D. Miss. Apr. 18, 2023). This Court, sitting en banc, recently affirmed that principle (though the decision was ultimately vacated as moot). *See Feds for Medical Freedom v. Biden*, 63 F.4th 366, 387 (5th Cir. 2023) ("[A]n injunction *could* benefit non-parties as long as that benefit was merely incidental." (cleaned up)), *cert. granted*, *judgment vacated*, No. 23-60, 2023 WL 8531839 (U.S. Dec. 11, 2023).

S.B. 2358 must be enjoined as to all persons protected under Section 208 to prevent irreparable harm to Plaintiffs and ensure the uniformity of federal voting laws.

CONCLUSION

This Court should affirm the district court's preliminary injunction as applied to assistance for voters covered under Section 208 of the VRA.

Dated: January 16, 2024

Respectfully submitted,

/s/ Leslie Faith Jones
Leslie Faith Jones

LESLIE FAITH JONES
SOUTHERN POVERTY LAW CENTER
111 East Capitol Street, Suite 280
Jackson, Mississippi 39201
(601) 317-7519
leslie.jones@splcenter.org

BRADLEY E. HEARD
SABRINA KHAN
JESS UNGER
SOUTHERN POVERTY LAW CENTER
150 E. Ponce de Leon Avenue, Suite 230
Decatur, GA 30030
(334) 213-8303
bradley.heard@splcenter.org
sabrina.khan@splcenter.org
jess.unger@splcenter.org

AHMED SOUSSI
SOUTHERN POVERTY LAW CENTER
201 Saint Charles Avenue, Suite 2000
New Orleans, Louisiana 70170
(334) 213-8303
ahmed.soussi@splcenter.org

ROBERT MCDUFF
MISSISSIPPI CENTER FOR JUSTICE
210 E. Capitol St., Suite 1800
Jackson, Mississippi 39201

JOSHUA TOM
CLAUDIA WILLIAMS HYMAN
AMERICAN CIVIL LIBERTIES UNION
OF MISSISSIPPI FOUNDATION
101 South Congress Street
Jackson, Mississippi 39201
(601) 354-3408
jtom@aclu-ms.org
cwilliamshyman@aclu-ms.org

MING CHEUNG
CASEY SMITH
ARI J. SAVITZKY
SOPHIA LIN LAKIN
AMERICAN CIVIL LIBERTIES UNION
FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2500
mcheung@aclu.org
csmith@aclu.org
asavitzky@aclu.org
slakin@aclu.org

GRETA KEMP MARTIN
DISABILITY RIGHTS MISSISSIPPI
5 Old River Place, Suite 101
Jackson, MS 39202
Office: (601)968-0600

(601) 259-8484
rmcduff@mscenterforjustice.org

Facsimile: (601)968-0665
gmartin@drms.ms

COUNSEL FOR PLAINTIFFS-APPELLEES

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limits of Fed. R. App. P. 27(d)(2) because it contains 12,990 words, excluding parts exempted by the Rules. This document complies with the typeface and type-style requirements of Fed. R. App. P. 27(d)(1) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Leslie Faith Jones
Leslie Faith Jones

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2024, a true and correct copy of the foregoing document was served on all counsel of record by filing with the Court's CM/ECF system.

/s/ Leslie Faith Jones
Leslie Faith Jones