No. 25-890

IN THE

Supreme Court of the United States

ARKANSAS UNITED AND L. MIREYA REITH,

Petitioners,

v.

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

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Arkansas asks this Court to allow the issue of private enforcement of the Voting Rights Act (VRA) to "percolate" indefinitely. But this is no single novel interpretation of a new and ambiguous statute. Rather, the Eighth Circuit—through three separate decisions—has singularly foreclosed any possibility of private enforcement of the most successful civil rights legislation in United States history. This despite six decades of private enforcement since the VRA was enacted in 1965. The elimination of a private right of action under the VRA itself, under 42 U.S.C. § 1983, and finally under the 1908 case of *Ex parte Young* contradicts longstanding precedent and practice.

In this specific case, the circuit has prevented enforcement of an explicit statutory guarantee that a qualified voter may choose someone whom the voter trusts to assist in casting a ballot. "Percolation" here would allow the vital right to cast an informed ballot—in all of the states in the Eighth Circuit—to be filtered into elimination. It would squeeze out the rights of those specifically guaranteed those rights by Congress. This Court should resist the invitation to pernicious percolation.

The Eighth Circuit's decision uniquely deviates from the jurisprudence of every other court across the country. This Court should grant certiorari.

I. The Eighth Circuit's decision warrants review.

Respondents do not dispute that the Eighth Circuit is the only circuit where private plaintiffs will be unable to seek equitable relief or bring a private right

of action under Section 208.[1] Opp. at 10-14. This Court's review is warranted.

A. The circuits are split.

The Eighth Circuit is the only appellate court in the country to hold that Section 208 cannot be privately enforced. Pet. at 14; *OCA-Greater Houston v. Texas*, 867 F.3d 604, 609-614 (5th Cir. 2017) (allowing private plaintiffs to sue under Section 208); *La Union Del Pueblo Entero v. Abbott*, 151 F.4th 273, 282 (5th Cir. 2025) (recognizing that private plaintiffs may sue under Section 208); *Nelson v. Miller*, 170 F.3d 641, 647 (6th Cir. 1999) (finding that "*Ex parte Young* applies to give the federal courts jurisdiction" in Section 208 cases). The Eighth Circuit has similarly departed from the unanimous consensus of federal district courts, which have consistently reached the opposite conclusions. *See* Pet. at 16-17. This Court should grant certiorari to resolve the clear conflict between the Eighth Circuit's decision and the unbroken line of cases allowing private litigants to vindicate their rights under Section 208.

Respondents maintain that the existing split is premature because most other courts have not specifically addressed whether private parties can

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[1] Respondents point to 42 U.S.C. § 1983 as a theoretically unaddressed vehicle for private enforcement, but the Eighth Circuit recently applied its restrictive doctrine on private right of action to Section 1983. *Turtle Mountain Band of Chippewa Indians v. Howe*, 137 F.4th 710, 721 (8th Cir. 2025), *cert. granted, judgment vacated sub nom. Turtle Mountain Band v. Howe*, No. 25-253, 2026 WL 1377069 (U.S. May 18, 2026). There is no viable distinction between Section 208 and Section 2 of the Voting Rights Act with respect to the Eighth Circuit's analysis of Section 1983.

enforce Section 208. Opp. at 11. Indeed, the Eighth Circuit based its ruling on consideration of how it previously ruled as to whether other sections of the VRA contain an implied private right of action. *See* Pet. at 6a ("Like the [Section 2] provision at issue in *Arkansas State Conference*, we conclude the text and structure of § 208 do not create a private right of action."). But Respondents and the Eighth Circuit alike ignore that other federal courts have either (i) held that Section 208 may be privately enforced or (ii) allowed Section 208 suits to move forward. Pet. at 15-16. The limited case law regarding private enforcement of Section 208 does not mean that the circuit split is nonexistent, or that the issue is unimportant. Instead, it demonstrates just how much of an anomaly the Eighth Circuit's decision is.

The Fifth Circuit's decision in *OCA-Greater Houston* is not less relevant because it did not directly review whether Section 208 allowed for a private right of action, nor is it less relevant because it recognized that "federal jurisdiction" over the case was proper. *OCA-Greater Houston*, 867 F.3d at 612. Rather, the case is relevant because it held, in an action by private plaintiffs, that the Texas Election Code was preempted by Section 208 of the VRA. *Id.* at 614. *La Union Del Pueblo Entero* is relevant for the same reason. Despite not expressly deciding whether private plaintiffs may sue under Section 208, the Fifth Circuit implicitly recognized that private plaintiffs may sue under Section 208. *La Union Del Pueblo Entero*, 151 F.4th at 282. The absence of a direct ruling from other circuits merely reflects the fact that the Eighth Circuit is the first to disrupt this long-standing consensus. Importantly, private enforcement of Section 208 remains available in every other jurisdiction. Pet. at 15-18.

B. The Eighth Circuit's decision is contrary to Supreme Court precedent.

The Eighth Circuit strayed by failing to address the merits of whether Section 208 is suitable for injunctive relief under *Ex parte Young* and by holding that Section 208 is not privately enforceable.

In 1908, this Court created the *Ex parte Young* doctrine, which permits private plaintiffs to seek injunctive relief against state officials who violate federal law. *Ex parte Young*, 209 U.S. 123, 155-56 (1908). For over a century, this Court has continuously recognized that federal courts may enjoin preempted state actions. Following precedent, this Court noted in *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320 (2015), that "federal courts may in some circumstances grant injunctive relief against state officers who are violating … federal law." *Id.* at 326. Because the Arkansas Election Code's arbitrary six-voter limit directly conflicts with Section 208's guarantee of a voter's choice of assistant, an *Ex parte Young* action may serve as the vehicle to vindicate the Supremacy Clause.

Contrary to Respondents' arguments, Opp. at 22-24, *Armstrong* does not preclude a case in equity here. In *Armstrong*, the Court held that a Medicaid provision precludes equitable relief because (1) the statutory text explicitly mandates a single, administrative remedy (withholding federal funds); and (2) the text lacks a judicially manageable standard. *Armstrong*, 575 U.S. at 328. The VRA is the opposite. It does not explicitly mandate a single administrative remedy. And, Section 208 provides a bright-line, judicially manageable rule: an eligible voter may choose anyone to assist except an employer or union

representative. Moreover, unlike in *Armstrong*, where the Court highlighted the "sheer complexity associated with enforcing § 30(A)," nothing in the VRA's text or structure suggests complexity sufficient to displace the baseline availability of equitable relief. *Id.* at 329. To the contrary, the VRA has a long history of private enforcement, including Section 208 enforcement, and was designed as a sweeping remedial statute to expand, not restrict, access to federal courts to safeguard the right to vote.

This Court's structural framework in *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996), also confirms that Section 208 is privately enforceable. In *Morse*, a majority of the Court recognized an implied private right of action to enforce Section 10 of the VRA despite the absence of explicit statutory text authorizing private suits. Drawing directly on the VRA's overarching remedial purpose, the Court reasoned that the existence of a private right of action "has been clearly intended by Congress" where a provision is enacted to protect private litigants. *Id.* at 232 (opinion of Stevens, J., joined by Ginsburg, J.) *accord id.* at 240 (Breyer, J., concurring in judgment) ("I do not know why Congress would have wanted to treat enforcement of § 10 differently from enforcement of §§ 2 and 5, particularly after 1975."). Because Section 208 explicitly guarantees that "[a]ny voter" requiring assistance may be assisted by a person of their choice, the structural logic of *Morse* dictates that a private enforcement mechanism must follow. Nowhere in Respondents' opposition do they address the logical conclusions arising from *Morse*.

Instead, Respondents assert that Congress intended for enforcement authority under Section 208 to lie exclusively with the Attorney General. Opp. at 24-25.

But this Court has repeatedly rejected the false oppositional dichotomy between public and private enforcement. The existence of an explicit role for the Attorney General is not incompatible with a private right of action; rather, the two pathways are complementary components of a comprehensive remedial scheme. Entrusting the Department of Justice with enforcement authority ensures systemic oversight. It does not signal an intent to strip aggrieved individuals of the ability to protect their own rights if the government fails to do so. Indeed, private suits provide a vital backstop to ensure that individual statutory guarantees are uniformly vindicated nationwide.

This Court solidified this principle in *Allen v. State Bd. of Elections*, where it rejected the notion that the Attorney General's explicit enforcement responsibilities under the VRA precluded private litigation. *Allen v. State Bd. of Elections*, 393 U.S. 544, 556-557 (1969). This Court recognized that the Attorney General "has a limited staff and often might be unable to uncover quickly new regulations and enactments passed at the varying levels of state government," making private enforcement not a disruption, but an essential adjunct to public oversight. *Id.* at 556. Respondents' insistence that public enforcement swallow up private remedies attempts to revive the same exclusivity arguments that *Allen* discarded decades ago.

Because nothing in the VRA evinces congressional intent to displace the inherent equitable powers of the federal courts or to confer exclusive enforcement authority upon the Attorney General, the Eighth Circuit's analysis fails. Far from being a procedural defect, actions for prospective equitable relief and

private actions brought under Section 208 are both traditional and proper mechanisms to halt state-enforced obstruction of Section 208's right to assistance for eligible voters.

II. The questions presented are important.

These are recurring important questions of federal law with significant implications for voters who need assistance to vote. Respondents concede that "whether § 208 is privately enforceable may be an important question[.]" Opp. at 21. Yet, Respondents nevertheless contend that the questions presented require further "percolation" in the lower courts. Opp. at 14. Allowing the issue to simmer indefinitely imposes immense voting obstacles for an entire group of vulnerable voters, making immediate resolution by this Court imperative.

First, the effect of Arkansas' arbitrary six-voter limit is not hypothetical; there was at least one Arkansas United staff member who was unable to assist further voters because she reached the six-voter limit. It will likely continue to threaten Arkansas voters' ability to vote despite being divorced from documented instances of voter fraud or undue influence by assistors. Pet. at 7-8. As the record demonstrates, Arkansas United has a history of providing assistance to voters and was forced to turn away eligible voters who requested and needed assistance to navigate the ballot. R. Doc. 148-6 at 4-5; R. Doc. 139-20; Pet. at 9-10. Individuals who otherwise would have received assistance to successfully cast their ballot were unable to be assisted by Arkansas United, the assistor of their choice, threatening their ability to participate in the democratic process. Pet. at 9-10.

Moreover, Respondents' opposition misleadingly omits Arkansas United's executive director's deposition testimony where she states that "[i]t was a possibility" that members were turned away and noted that there was "at least one case" where a member and a staff member were unable to connect in the first instance, and thus were never able to confirm whether the individual was ultimately assisted. R. Doc. 134-1 at 46. Respondents further fail to acknowledge the numerous voters who were turned away during early voting in anticipation of the arbitrary six-voter limit and Arkansas United's limited staff and volunteers.

Second, the deterrent and discouragement effect of an arbitrary limit to the number of voters someone may assist is also real, though perhaps unmeasurable. The Arkansas law will cause some voters who need assistance to fail to cast a ballot as the law's restriction on availability of assistance becomes more well-known.

Additional percolation serves no purpose in light of this Court's well-established precedent recognizing private rights of action under the VRA. In both *Allen* and *Morse*, this Court permitted private enforcement of Sections 5 and 2 despite the absence of explicit statutory text, tethering its analysis to the VRA's broad constitutional mission. *Allen* did not rely on text specific to Section 5, but rather on the VRA's "broad purpose" to "make the guarantees of the Fifteenth Amendment finally a reality for all citizens." *Allen*, 393 U.S. at 556-57. This Court's decision in *Morse* further confirmed that the VRA's lack of an explicit enforcement text was no barrier to private suit. *Morse*, 517 U.S. at 231-32 (opinion of Stevens, J., joined by Ginsburg, J.); *accord id.* at 240 (opinion of Breyer, J.,

concurring in the judgment, joined by O'Connor and Souter, JJ.).

Respondents also misrepresent the state of voting assistance regulation. Opp. at 3. The Minnesota Supreme Court in *DSCC v. Simon* held that "the district court did not abuse its discretion in finding a likelihood of success that the three-voter limit on marking ballots, Minn. Stat. § 204C.15, subd. 1 (2018), is preempted by section 208 of the Voting Rights Act[.]" *DSCC v. Simon*, 950 N.W.2d 280, 290 (Minn. 2020). Accordingly, restrictions on voting assistance are not a universally accepted form of voter protection, as evidenced by the Minnesota legislature raising these issues in their suit preempting Minnesota's three-voter limit on assisting the marking of ballots. *Id.*

Finally, the question of whether private plaintiffs possess a right of action to enforce the protections of the VRA remains an issue of paramount importance. On May 18, 2026, this Court issued an order remanding *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 25-253, for further consideration. Because *Turtle Mountain* is no longer before this Court, that case's questions around private enforcement are now indefinitely delayed, leaving this petition as one of the only active petitions before the Court directly presenting the private enforcement question. Rather than counseling in favor of waiting, the evolving posture of *Turtle Mountain* emphasizes that the question of a private right of action under the VRA is a live controversy that will continue to threaten civil rights enforcement until this Court steps in.

The questions presented are recurring issues of import ripe for this Court's intervention. Further percolation will only multiply the real-world harms

already being suffered by Arkansas voters who are being denied their chosen assistor and being denied access to court on voting rights matters.

III. This case is a proper vehicle for the questions presented.

This case presents an ideal vehicle to resolve the critical questions presented because there are no procedural hurdles blocking the Court from reaching the merits of the questions presented. The Eighth Circuit considered and passed upon the questions, ensuring that they are preserved for disposition. Additionally, because the Eighth Circuit's reversal rested on threshold procedural grounds, a ruling from this Court will control the disposition of the case and be outcome-determinative.

A. Petitioners' questions are properly presented before this Court.

Any argument that Petitioners "failed to properly develop" the *Ex parte Young* argument, Opp. at 15-17, is belied by the record. As Chief Judge Colloton recognized in his dissent, Respondents "did not appeal the district court's recognition of a claim for equitable relief under the doctrine of *Ex parte Young*," undercutting Respondents' misleading contention that Petitioners neglected to argue that they had an equitable cause of action at the appellate level of this litigation. Pet. at 109a; *see also* Pet. at 54a. The United States Department of Justice also filed an amicus brief in the Eighth Circuit specifically arguing that the district court had correctly held that private plaintiffs can sue under *Ex parte Young* to enjoin enforcement of Arkansas' arbitrary six-voter limit. Furthermore, Petitioners' initial request for prospec-

tive injunctive relief to halt the enforcement of a preempted state law is the definition of a suit "[u]nder the exception established in *Ex parte Young*[.]" *McDaniel v. Precythe*, 897 F.3d 946, 951–52 (8th Cir. 2018).

Additionally, the Eighth Circuit passed on the question as its ruling explicitly turned to "the possibility that preemption principles may be a source for equitable relief" and concluded that "such relief was unwarranted[.]" Pet. at 12a. It is well-settled that an issue is preserved for this Court's review if it was either pressed below or "passed upon" by the lower court. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 374 (1995) (noting that it was proper for this Court to consider an argument "even though Lebron disavowed it in both lower courts and did not explicitly raise it until his brief on the merits here" because, in part, "it was passed upon below" and "was fairly embraced within both the question presented and the argument set forth in the petition.").

Accordingly, Petitioners' arguments were properly developed and preserved for this Court.

B. The questions presented are outcome-determinative.

Respondents fail to address the fact that the Eighth Circuit *never reached* the merits of Petitioners' preemption claim. Opp. at 18-20; Pet. at 9a-12a. The Eighth Circuit's decision reversed the district court's judgment based exclusively on its holding that private plaintiffs lacked a vehicle, statutory or equitable, to bring the suit in the first place. Pet. at 9a-12a. Because the Eighth Circuit dismissed the case on threshold procedural grounds, a ruling from this Court reversing those legal errors is absolutely outcome-

determinative as to whether the case may proceed. Indeed, the trajectory of the litigation reveals that the only court to actually evaluate the merits—the district court—concluded that Section 208 *does* preempt Arkansas' arbitrary six-voter limit. Accordingly, resolving the threshold questions is highly likely to determine the ultimate outcome of the litigation by restoring the district court's preemption ruling.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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