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.

Appeal from the United States District Court
for the Southern District of Mississippi
No. 3:23-cv-350

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DEFENDANTS-APPELLANTS' SUGGESTION OF MOOTNESS AND MOTION TO VACATE THE ORDER BELOW AND REMAND WITH INSTRUCTIONS TO DISMISS THE CASE AS MOOT

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CERTIFICATE OF INTERESTED PERSONS

Under this Court's Rule 28.2.1, governmental parties need not furnish a certificate of interested persons.

s/ Justin L. Matheny
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii
INTRODUCTION 1
BACKGROUND 1
ARGUMENT 6
REQUEST FOR RELIEF 17
CERTIFICATE OF CONFERENCE 18
CERTIFICATE OF SERVICE 18
CERTIFICATE OF COMPLIANCE 18

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TABLE OF AUTHORITIES

Page(s)

Cases

Am. Bar Ass'n v. FTC,
636 F.3d 641 (D.C. Cir. 2011) 12

Arizonans for Official English v. Arizona,
520 U.S. 43 (1997) 11, 14

AT&T Commc'ns of Sw., Inc. v. City of Austin,
235 F.3d 241 (5th Cir. 2000) 12

Board of Trustees of Glazing Health & Welfare Trust v. Chambers,
941 F.3d 1195 (9th Cir. 2019) (en banc) 7, 12

Calderon v. Moore,
518 U.S. 149 (1996) (per curiam) 7

Freedom From Religion Foundation, Inc. v. Abbott,
58 F.4th 824 (5th Cir. 2023) 7, 9, 11, 14, 15

Genesis Healthcare Corp. v. Symczyk,
569 U.S. 66 (2013) 10

Goldin v. Bartholow,
166 F.3d 710 (5th Cir. 1999) 10

Green Valley Special Util. Dist. v. City of Schertz, Texas,
969 F.3d 460 (5th Cir. 2020) (en banc) 14

Hall v. Louisiana,
884 F.3d 546 (5th Cir. 2018) 15

Jimenez v. Lumpkin,
No. 19-51083, 2023 WL 4499874 (5th Cir. July 10, 2023) 12

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Lewis v. Cont'l Bank Corp.,
494 U.S. 472 (1990) 6, 7

Motient Corp. v. Dondero,
529 F.3d 532 (5th Cir. 2008) 6, 7, 8

Nat'l Black Police Ass'n v. D.C.,
108 F.3d 346 (D.C. Cir. 1997) 13

Pederson v. Louisiana State Univ.,
213 F.3d 858 (5th Cir. 2000) 16

Shoemate v. Mississippi Dep't of Corr.,
668 F. App'x 124 (5th Cir. 2016) 12

United States v. Microsoft Corp.,
138 S. Ct. 1186 (2018) 12

United States v. Munsingwear, Inc.,
340 U.S. 36 (1950) 10, 13, 15

U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship,
513 U.S. 18 (1994) 11, 12, 13

Constitutional Provisions

U.S. Const. art. III, § 2 6

U.S. Const. art. VI 14

Rule

Fed. R. App. P. 27 1

Statutes

Miss. Code Ann. § 23-15-907 .... 1, 4

Mississippi Senate Bill 2358 (S.B. 2358) 1-6, 8, 9, 15

Mississippi Senate Bill 2425 (S.B. 2425) 1, 4-9, 15, 16

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INTRODUCTION

On May 8, 2024, this Court granted defendants' motion to cancel oral argument and hold this appeal in abeyance due to the enactment of Mississippi Senate Bill 2425. That law amends the 2023 state ballot-harvesting law (Senate Bill 2358) that is the subject of this appeal. As of today, July 1, 2024, S.B. 2425 has taken effect and this case is now moot. In accordance with Federal Rule of Appellate Procedure 27, defendants respectfully move this Court to vacate the district court's order enjoining the enforcement of S.B. 2358, remand to that court with instructions to dismiss the case as moot, and dismiss this appeal.

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BACKGROUND

1. This lawsuit challenges 2023 Mississippi Senate Bill 2358, a law enacted to address the harms caused by ballot harvesting. S.B. 2358, which was codified at Miss. Code Ann. § 23-15-907, provided that: "A person shall not knowingly collect and transmit a ballot that was mailed to another person." S.B. 2358 § 1(1). The law included exceptions for: "[a]n election official while engaged in official duties as authorized by law"; "[a]n employee of the United States Postal Service while engaged in official duties"; "[a]ny other individual who is allowed by federal law to collect and transmit United States mail while engaged in official duties"; "[a] family member, household member, or caregiver of the person to whom the ballot was mailed"; and "[a] common carrier." *Id.* § 1(1)(a)-(e).

On May 31, 2023, two organizations and three individuals filed this suit. They claimed that S.B. 2358 conflicted with and was preempted by Section 208 of the Voting Rights Act of 1965, a federal law that allows blind, disabled, and illiterate voters to receive assistance with voting. Section 208 provides that a blind, disabled, or illiterate voter "who requires assistance to vote" "may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508. Plaintiffs argued that Section 208 gives covered voters the "right to seek assistance" with "deliver[ing]" a mail-in ballot "from anyone" other than a voter's employer or union officials. ROA.34. They maintained that S.B. 2358 "reverse[d] the rule created by Section 208" by "prohibiting almost all assistance with only specific exceptions" for (for example) "family members, household members, or caregivers." ROA.34. And "by impermissibly narrowing the universe of people who may assist in the voting process," plaintiffs argued, S.B. 2358 "directly conflict[ed] with" and was preempted by Section 208. ROA.22.

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The organizational plaintiffs are Disability Rights Mississippi (DRMS) and the League of Women Voters of Mississippi (LWV-MS). ROA.23-27. DRMS is a non-profit protection and advocacy agency that said that it "[p]rotect[s] the voting rights of individuals with disabilities ... by assisting Mississippi voters in every step of the voting process."

ROA.24. LWV-MS is a non-profit advocacy group that said that it "conducts voter service and education activities." ROA.25. LWV-MS alleged that it has "at least one member who has assisted [disabled or illiterate] voters ... with the return of their mail-in absentee ballot and intends to do [so] in the future." ROA.25. It also claimed to have "at least one member who voted absentee by mail in a prior election." ROA.25.

The individual plaintiffs are Mamie Cunningham, Yvonne Gunn, and William Earl Whitley. ROA.23-27. Ms. Cunningham and Ms. Gunn alleged that they have assisted members of their communities (including disabled or illiterate voters) with mail-in voting in past elections. They wish to continue doing so but claimed to fear prosecution under S.B. 2358. ROA.26. Mr. Whitley claimed that he is a disabled voter who wishes to receive assistance with mailing his absentee ballot from Ms. Cunningham and Ms. Gunn. ROA.26-27. Mr. Whitley alleged that S.B. 2358 deprived him of his preferred voting assistants because neither Ms. Cunningham nor Ms. Gunn fell within S.B. 2358's exceptions for family members, household members, or caregivers. *See* ROA.32-33, 98.

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2. On July 25, 2023, the district court issued an "Abbreviated Order" holding that S.B. 2358 likely conflicted with and was preempted by Section 208. ROA.332-338. The court stated that Section 208 guarantees "voters who require assistance with voting due to physical disabilities, blindness, or language barriers" the "right to seek assistance

from 'any person they want,' with only two specific exceptions [for a voter's employer and union]." ROA.335. The court also said that S.B. 2358's lack of "definitions" and "guideposts" made it hard to "ascertain" whether assistants like Ms. Cunningham and Ms. Gunn fell within the statute's exceptions for family members, household members, and caregivers. ROA.336, 337. So the court enjoined defendants "from applying" S.B. 2358 in "the 2023 primary and/or general Mississippi elections" and thereafter "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.338. The court promised to issue "a more detailed Memorandum Opinion and Order, with additional facts and law." ROA.338. Nearly a year later, no such opinion and order has issued.

3. Defendants appealed. ROA.339-340. The appeal was fully briefed as of February 6, 2024. Dkt. 67. On April 17, this Court tentatively scheduled oral argument for the week of July 8. Dkt. 80.

4. On April 22, 2024, while the appeal was pending, Governor Tate Reeves signed into law Senate Bill 2425. *See* Dkt. 83-2. S.B. 2425 amends Miss. Code Ann. § 23-15-907—the provision codifying S.B. 2358—in two ways. First, S.B. 2425 adds definitions for the terms "[c]aregiver," "[f]amily member," and "[h]ousehold member." S.B. 2425 § 1(1)(a)-(c). Second, S.B. 2425 adds the following provision:

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> Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union, or a candidate whose name is on the ballot, or by a spouse, parent, sibling or child of a candidate whose name is on the ballot, or by a poll watcher who is observing the polling place on election day; however, a candidate for public office or the spouse, parent or child of a candidate may provide assistance upon request of any voter who is related within the first degree.

Id. § 1(4). S.B. 2425 takes effect today—July 1, 2024. *Id.* § 2.

5. In light of S.B. 2425, on April 26, 2024, defendants moved this Court to cancel oral argument and hold this appeal in abeyance. Dkt. 83-1. Defendants explained that this appeal would become moot when S.B. 2425 took effect because that law amends S.B. 2358 (the statute challenged by plaintiffs) in a way that eliminates plaintiffs' alleged injuries and thus eliminates their legally cognizable interest in the outcome of the case. Dkt. 83-1 at 5-9. The motion stated that defendants would file a suggestion of mootness and a request to dismiss this appeal once the appeal became moot. Dkt. 83-1 at 5.

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Plaintiffs filed a response on May 3, 2024. Dkt. 87. They "d[id] not oppose canceling the scheduled oral argument date and holding this appeal in abeyance" in light of defendant's "representation" that S.B. 2425 "does not prohibit a person of the voter's choice from providing assistance with the collection and transmission of a ballot, unless the

chosen person is among the limited exceptions identified in S.B. 2425 § 1(4).” Dkt. 87 at 1. Plaintiffs’ “reserve[d] the right to respond to any forthcoming motions regarding mootness.” *Ibid.*

6. On May 8, 2024, this Court granted defendants’ motion, stayed further proceedings, and cancelled oral argument. Dkt. 90-1.

ARGUMENT

This appeal is now moot. Because S.B. 2425 is now in effect, plaintiffs can no longer allege any plausible injury from the enforcement of Mississippi’s operative ballot-harvesting law and thus lack a legally cognizable interest in this lawsuit. Consistent with established practice, this Court should vacate the district court’s order enjoining the enforcement of S.B. 2358 and remand with instructions to dismiss the case.

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1. As explained in defendants’ abeyance motion (Dkt. 83-1 at 5-9), this case is now moot. Under the U.S. Constitution, the judicial power extends only to “Cases” and “Controversies.” U.S. Const. art. III, § 2. For a lawsuit to be justiciable, “[a]n actual case or controversy must exist at every stage in the judicial process.” *Motient Corp. v. Dondero*, 529 F.3d 532, 537 (5th Cir. 2008); *see Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 477 (1990) (“This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate.”).

A case becomes moot if "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Motient Corp.*, 529 F.3d at 537. That is because the Constitution "denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them, and confines them to resolving real and substantial controversies admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Lewis*, 494 U.S. at 477 (internal quotation marks, citations, and brackets omitted). Federal courts thus "cannot give opinions on 'moot questions or abstract propositions.'" *Motient Corp.*, 529 F.3d at 537 (quoting *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (per curiam)). "[W]here, as here, a statute ... is amended or repealed after plaintiffs bring a lawsuit challenging the legality of that statute," "mootness is the default." *Freedom From Religion Foundation, Inc. v. Abbott*, 58 F.4th 824, 832 (5th Cir. 2023); *see ibid.* (collecting cases); *Board of Trustees of Glazing Health & Welfare Trust v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (en banc) (Courts "should presume that the repeal, amendment, or expiration of legislation will render an action challenging the legislation moot.").

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Under these principles, this appeal became moot when S.B. 2425 took effect today. S.B. 2425 amends the statute challenged by plaintiffs in this suit. That amendment eliminates the injuries that plaintiffs

alleged. So plaintiffs now "lack a legally cognizable interest in the outcome" of the case, and the case is moot. *Motient Corp.*, 529 F.3d at 537.

Start with Mr. Whitley, the sole individual plaintiff-voter who claimed to need assistance with mailing his absentee ballot. He alleged that S.B. 2358 would harm him because his preferred voting assistants—plaintiffs Ms. Cunningham and Ms. Gunn—would not fall within the statute's exceptions for family members, household members, or caregivers. ROA.98. Under S.B. 2425, however, disabled voters like Mr. Whitley are not limited in their choice of assistant to the specific categories included in S.B. 2358. Rather, such voters may receive assistance from "a person of [their] choice" "other than" their "employer" or "union" officials, "a candidate whose name is on the ballot," certain family members of candidates, or "a poll watcher who is observing the polling place on election day." S.B. 2425 § 1(4). Employers and union officials are also excluded from providing voting assistance under Section 208. *See* 52 U.S.C. § 10508. And plaintiffs have not alleged that either Ms. Cunningham or Ms. Gunn is a candidate, a family member of a candidate, or a poll watcher prevented from assisting Mr. Whitley under the newly enacted S.B. 2425.

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For similar reasons, Ms. Cunningham and Ms. Gunn also no longer face injury from S.B. 2358. They wish to provide assistance with mail-in voting to blind, disabled, or illiterate voters and feared injury (in the form

of prosecution) from S.B. 2358 for doing so. ROA.26. But plaintiffs have made no allegations that they would face injury if such voters may receive assistance from "a person of [their] choice" within the range of voting assistants permitted by S.B. 2425. *See* S.B. 2425 § 1(4); *see also* Dkt. 87 at 3 (plaintiffs recognizing that "[d]efendants' interpretation of S.B. 2425" would "exempt persons like the individual [p]laintiffs from criminal liability").

Nor do the organizational plaintiffs have any continuing claim of injury from S.B. 2358. Plaintiffs claimed that S.B. 2358 would "disenfranchise[ ]" some of the organization's unidentified "constituents." ROA.35; *see* Pls. Br. 41. For example, plaintiffs claimed that S.B. 2358's "vagueness" and lack of definitions for the caregiver exception would "chill[ ] staff members from assisting" disabled voters in "nursing homes and long-term care facilities." Pls. Br. 41. S.B. 2425 eliminates any such claim of injury. It allows disabled voters to receive assistance from an even broader universe of individuals than S.B. 2358. And plaintiffs have never pointed to any member or constituent of the organizational plaintiffs who could be denied their choice of assistant under what S.B. 2425 now permits.

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Because plaintiffs' "asserted injur[ies]" are "tied to the existence" of provisions of Mississippi's ballot-harvesting law that no longer exist, this case is now moot. *Freedom From Religion*, 58 F.4th at 832. And where,

as here, a case is mooted by "an intervening circumstance" that "deprives the plaintiff[s] of a personal stake in the outcome," "the action can no longer proceed and must be dismissed." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 72 (2013) (internal quotation marks omitted); *e.g.*, *Goldin v. Bartholow*, 166 F.3d 710, 718 (5th Cir. 1999) ("If a case becomes moot on appeal, the general rule is still to vacate the judgment of the lower court and remand with instructions to dismiss the case as moot."). This Court should therefore remand and instruct the district court to dismiss the case as moot.

2. Because this case became moot before it could be fully litigated on the merits, this Court should also vacate the district court's judgment under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950).

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In *Munsingwear*, the Supreme Court described the "established practice" in civil cases that "become moot" on appeal: "[T]he judgment below" is generally "reverse[d] or vacate[d]" and the case is "remand[ed] with a direction to dismiss." 340 U.S. at 39. That practice "prevent[s] a judgment" that is "unreviewable because of mootness" "from spawning any legal consequences." *Id.* at 41. The "*Munsingwear* doctrine is an equitable one," which "avoid[s] the unfairness of a party's being denied the power to appeal an unfavorable judgment by factors beyond its control." *Goldin*, 166 F.3d at 719. "[T]he determination" to vacate should be made "in the manner most consonant to justice" and "in view of the

nature and character of the conditions which have caused the case to become moot." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24, 29 (1994) (internal quotation marks omitted).

In deciding whether to follow the general rule in a particular case, "two equitable considerations [are] particularly relevant." *Freedom From Religion*, 58 F.4th at 836. "First, a court must consider whether the party seeking relief from the judgment below caused the mootness by voluntary action." *Ibid.* (internal quotation marks omitted). And second, a court must "take account of the public interest," including "the value" of the relevant "judicial precedent[ ]" and the "federalism concern[s] relating to the premature adjudication of a constitutional challenge to a state law." *Ibid.* (cleaned up). In certain cases, this Court has also considered whether "the action mooting the dispute is temporary" and "whether the party seeking vacatur is subject to a money judgment or any injunctive relief as a result of the district court's judgment." *Ibid.* (internal quotation marks omitted).

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The equitable considerations here all weigh in favor of vacatur.

First, defendants did not "cause[ ] the mootness by voluntary action"—or otherwise. *Freedom From Religion*, 58 F.4th at 836; *e.g.*, *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) ("Vacatur is in order when mootness occurs through happenstance—circumstances not attributable to the parties."). Rather, plaintiffs' claims

were mooted by action of the Mississippi Legislature, which amended the State's ballot-harvesting law in a way that eliminated plaintiffs' alleged injuries. The "principal condition" for vacatur—"whether the party seeking relief from the judgment below caused the mootness by voluntary action"—thus straightforwardly favors vacatur. *U.S. Bancorp Mortg.*, 513 U.S. at 24; *see Jimenez v. Lumpkin*, No. 19-51083, 2023 WL 4499874, at *1 (5th Cir. July 10, 2023) ("equity favors vacating the district court's opinion and judgment" where "[a]ny mootness was not caused by any voluntary action done by" the losing party). Indeed, courts regularly order vacatur where, as here, a case was mooted by intervening changes in the law. *E.g.*, *United States v. Microsoft Corp.*, 138 S. Ct. 1186, 1188 (2018) (remanding with instructions to vacate where intervening changes in operative law rendered further review moot); *Chambers*, 941 F.3d at 1199-1200 (remanding with instructions to vacate because "[n]o live controversy remain[ed]" following a legislative repeal); *Shoemate v. Mississippi Dep't of Corr.*, 668 F. App'x 124, 125 (5th Cir. 2016) ("[v]acatur [was] appropriate" where intervening amendment to Mississippi law meant there was no longer any "case or controversy"); *Am. Bar Ass'n v. FTC*, 636 F.3d 641, 649 (D.C. Cir. 2011) (ordering vacatur where intervening congressional enactment rendered case moot); *AT&T Commc'ns of Sw., Inc. v. City of Austin*, 235 F.3d 241, 244 (5th Cir. 2000) (ordering vacatur where "[Texas] House Bill 1777," "and not [the

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defendant's] responses to it," "caused th[e] case to become moot"); *Nat'l Black Police Ass'n v. D.C.*, 108 F.3d 346, 353-54 (D.C. Cir. 1997) ("[T]he general rule in favor of vacatur ... applies" "when legislative action moots a case and the government seeks vacatur."); *cf. U.S. Bancorp Mortg. Co.*, 513 U.S. at 25 n.3 ("The suit for injunctive relief in *Munsingwear* became moot on appeal because the regulations sought to be enforced by the United States were annulled by Executive Order.").

Second, the public interest strongly supports vacatur. The district court held that Mississippi's then-operative ballot-harvesting law likely conflicted with and was preempted by Section 208 of the VRA. ROA.332-338. The court declared (without analysis) that Section 208 guarantees blind, disabled, and illiterate voters the right to seek assistance from nearly "any person they want," ROA.335, and thus likely preempts a state law that narrows a voter's choice of assistants. The court reached that conclusion in an abbreviated (and vague) order—which was issued at the preliminary-injunction stage without the benefit of fact development—that fails to assess the text, structure, or purpose of the relevant state and federal laws. Defs. Br. 23-27, 29-31; *see* ROA.335-337. The order also lacks a full preemption analysis and ignores key background principles, such as the primacy of States in regulating elections, the overriding commands of federalism, and the limits on preemption. Defs. Br. 27-29, 39-45. Indeed, the district court itself noted

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the preliminary nature of its decision, promising to issue a "more detailed" opinion "with additional facts and law." ROA.338. But, a year later, no such order has been issued. Thus, for many reasons, the relevant "judicial precedent[ ]" has minimal "valu[e]" "to the legal community," *Freedom From Religion*, 58 F.4th at 837, and should be vacated. *See Green Valley Special Util. Dist. v. City of Schertz, Texas*, 969 F.3d 460, 470 (5th Cir. 2020) (en banc) ("the value of precedent ... is not implicated (at least as acutely) where a district court's decision—whose precedential value is limited only to its persuasiveness—would be taken off the books").

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Principles of federalism also support vacatur. The district court held that Mississippi's then-operative ballot-harvesting law impermissibly conflicted with federal law and thus was preempted under the Supremacy Clause. ROA.337-338. But "[i]n litigation generally, and in constitutional litigation most prominently, courts in the United States characteristically pause to ask: Is this conflict really necessary? When anticipatory relief is sought in federal court against a state statute, respect for the place of the States in our federal system calls for close consideration of that core question." *Arizonans for Official English*, 520 U.S. at 75. In this case, the district court reached its decision to broadly enjoin the State's then-operative ballot-harvesting law while (at best) minimizing the State's compelling interests in preserving election

integrity, combatting fraud, and enforcing duly enacted laws reflecting the will of its citizens. Defs. Br. 11-12, 27-31, 39-45. The court's order interpreted state and federal voting laws in ways that could—if left in place—have important "legal consequences" for the State's efforts to regulate elections and prevent fraud. *Munsingwear*, 340 U.S. at 41. Allowing the injunction to stand as persuasive authority on the State's efforts to combat ballot harvesting would thus "pose serious federalism concerns." *Freedom From Religion*, 58 F.4th at 837.

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The remaining equitable considerations also favor vacatur. There is no indication that the legislature's enactment of S.B. 2425 is "temporary." *Freedom From Religion*, 58 F.4th at 836. And without this Court's intervention, the "part[ies] seeking vacatur"—who are "not at fault" for the legislative action that "moot[ed] th[is] appeal"—could be "forced to acquiesce in [a] judgment" ordering "injunctive relief" against enforcing a law that has been materially amended. *Hall v. Louisiana*, 884 F.3d 546, 553-54 (5th Cir. 2018). The district court did not limit its injunction to the plaintiffs before it who had demonstrated standing and irreparable injury under the State's then-operative ballot-harvesting law. Instead, the court broadly enjoined S.B. 2358 in all situations involving voters covered by Section 208. Defs. Br. 49-53; *see* ROA.338. This Court should vacate that order to leave no doubt that defendants may enforce the State's current ballot-harvesting law as amended by

S.B. 2425. *Cf. Pederson v. Louisiana State Univ.*, 213 F.3d 858, 883 (5th Cir. 2000) ("To maintain the status quo by leaving the district court's injunctive order in place would work an injustice to Appellees, who, through no fault of their own, would be forced to comply with an order the merits of which they are powerless to contest.").

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REQUEST FOR RELIEF

This Court should vacate the district court's order, remand to that court with instructions to dismiss the case as moot, and dismiss this appeal.

Respectfully submitted,

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s/ Justin L. Matheny

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July 1, 2024

CERTIFICATE OF CONFERENCE

On July 1, 2024, counsel for defendants conferred with counsel for plaintiffs on this motion. *See* Fifth Circuit Rule 27.4. Counsel for plaintiffs do not oppose dismissing the appeal as moot but stated that their position is that the case should be remanded for further proceedings. Plaintiffs thus oppose the motion in part and intend to file a response.

Dated: July 1, 2024

s/ Justin L. Matheny
Justin L. Matheny
Counsel for Defendants-Appellants

CERTIFICATE OF SERVICE

I, Justin L. Matheny, hereby certify that the foregoing motion has been filed with the Clerk of Court using the Court's electronic filing system, which sent notification of such filing to all counsel of record.

Dated: July 1, 2024

s/ Justin L. Matheny
Justin L. Matheny
Counsel for Defendants-Appellants

CERTIFICATE OF COMPLIANCE

This motion complies with the word limitations of Fed. R. App. P. 27(d)(2)(A) because, excluding the exempted parts of the document, it contains 3644 words. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements

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of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally spaced typeface, including serifs, using Microsoft Word 2016, in Century Schoolbook 14-point font.

Dated: July 1, 2024

s/ Justin L. Matheny
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