No. 24-13111

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ALABAMA STATE CONFERENCE OF THE NAACP, et al.,
Plaintiffs-Appellees,

v.

STEVE MARSHALL, in his official capacity as
Attorney General of Alabama,
Defendant-Appellant.

On Appeal from the United States District Court for the
Northern District of Alabama, No. 2:24-CV-420-RDP

DEFENDANT-APPELLANT'S REPLY BRIEF

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CERTIFICATE OF INTERESTED PERSONS

Per Rule 26.1 and Eleventh Circuit Rule 26.1, the undersigned certifies that the individuals and entities named in the Certificates of Interested Persons contained in the previous briefs filed by Appellant, Appellees, and Amici Curiae reflect a complete list of interested persons with the addition of the following person:

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Respectfully submitted this 31st day of January 2025.

s/ Edmund G. LaCour Jr.
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INTRODUCTION

To fill out and submit Alabama's one-page application for an absentee ballot, some disabled, blind, or illiterate voters need assistance. Alabama's SB1 allows these voters to get the help they need from a person of their choice. SB1's only limitation is that voting assistance cannot be bought or sold. This reasonable regulation promoting neighborly aid while barring transactional assistance does not violate the Constitution by conflicting with Section 208 of the Voting Rights Act. The district court erred as a matter of law to hold that it does.

Congress enacted §208 in 1982 to address the now long-abandoned practice in some States of prohibiting all voting assistance for handicapped and illiterate voters by anyone other than an election official. Finding that these laws intimidated certain persons from voting, Congress created a limited right among disabled voters to receive necessary assistance from "a person of the voter's choice." But Congress created no right to receive *paid* assistance, just as it created no right to receive anonymous assistance or assistance by a candidate for office, foreign agent, employer, or union official. For decades, state laws reasonably regulating a disabled voter's "right to choose" were left virtually untouched. But very recently, some federal district courts have discovered an elephant in the §208 mousehole, turning this targeted protection into a categorical rule that bulldozes all manner of commonsense protections for voters across the country.

Relying on legislative history to find a "clear statement" in the text, the district court here stretched the scope of §208's "right to choose" to encompass the absurd, like giving convicted fraudsters federally mandated access to disabled voters. Plaintiffs, for their part, rewrite "*a* person of the voter's choice" to read "*any* person of the voter's choice" and string cite the recent rash of "out-of-circuit district court decisions" embracing their boundless view of §208. Pls.Br.33. When confronted with the absurdities this result would produce, Plaintiffs only response is to "take no position." Pls.Br.51 n.18.[1] Thus, Plaintiffs seek to expand the law's scope beyond any defensible limit. That's reason enough to reject their faux-textualism.

But even if Plaintiffs had the best reading of the statute, they cannot overcome the presumption against preemption. That principle ought to have been dispositive in this case, where the district court found the text "ambiguous." Proving the point are the *four* distinct interpretations of §208 offered by (1) Alabama and its *amici*, (2) Plaintiffs, (3) their D.C. *amici*, and (4) the United States. This Court need not decide which interpretation is best. If the text of §208 *can* support Alabama's reading, rules of comity, federalism, and constitutional avoidance demand that it *must*.

And contrary to Plaintiffs' assurances that the "narrow" injunction does not stop Alabama from prosecuting voter fraud *after* it has occurred, their own evidence betrays the magnitude of its reach. Under the district court's order, Defendant is

[1] Page numbers cited reflect the blue ECF pagination. *See* 11th Cir. R. 28-5.

hamstrung from enforcing critical prophylactic protections for upwards of 1.5 million of the most vulnerable Alabamians—a ballot harvester's dream. Still, despite Plaintiffs' ipse dixit, the record contains no evidence that a single disabled, blind, or illiterate voter would suffer serious harm or face imminent injury under SB1.

Since §208 was enacted, no Court of Appeals has opined on the scope of §208's "right to choose." An affirmance by this Court would be deployed by tomorrow's plaintiffs to strike down yet more reasonable election laws, including in this circuit. *See, e.g.*, GA. CODE. ANN. §21-2-385 (prohibiting candidate and candidate's close relatives from assisting); FLA. STAT. ANN. §101.051(2) (prohibiting on-site assistors from soliciting assistance); *see also, e.g.*, TENN. STAT. §2-6-207 (prohibiting persons convicted of voter fraud from assisting). This Court should instead read §208 in light of the presumption against preemption and reverse the district court's order.

ARGUMENT

I. Section 208 Does Not Preempt Reasonable Election Laws Like SB1.

Congress enacted §208 to protect disabled, blind, and illiterate voters from intimidation and manipulation by affording them the right to bring into the voting process a trustworthy assistor. Alabama's SB1 protects the same right of the same voters, and, as such, stands as no barrier to Congress's purpose or the means of achieving it. The text of §208 confirms that State laws reasonably regulating the

relationship between voter and assistor are not preempted. SB1 is one of many such laws standing alongside §208 to guard vulnerable voters from undue influence.

To Plaintiffs, any limitation on a voter's "right to choose" conflicts with §208 because the text includes the phrase "a person of the voter's choice." After finding that phrase ambiguous, the district court spurned Supreme Court instruction by turning to legislative history to clear things up, concluding that any burden on a voter's choice is an impermissible "undue burden" that conflicts with federal law. No provision of the VRA so sweeping is "justified by current needs." *Nw. Austin Mun. util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009). Compounding this error, the district court discarded a harmonious reading of SB1 to hold that Alabama's law prohibits disabled voters from securing necessary assistance in submitting their absentee ballot application. It plainly does no such thing.

A. Avoiding the text, the district court stretched Section 208 to encompass absurd results Congress never intended.

"The plain meaning of a statute controls … unless the language is ambiguous or would lead to an absurd result." *United States v. Estrada*, 969 F.3d 1245, 1264 (11th Cir. 2020). The district court's error tags all the bases. First, the court brushed past the plain meaning of §208's text, which communicates no congressional intent to preempt laws that reasonably regulate *what* voting assistance is permitted rather than *whom* a voter may choose as an assistor. Second, the court held SB1 in direct conflict with §208 after finding §208's text ambiguous. Third, the court rejected a

plausible interpretation that avoids constitutional concerns in lieu of one that preempts state law and leads to absurd and admittedly uncomfortable results.

1. Section 208 states: "Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. §10508. Alabama's SB1 prohibits knowingly receiving or providing a payment or gift "for distributing, ordering, requesting, collecting, completing, prefilling, obtaining, or delivering a voter's absentee ballot application." ALA. CODE §17-11-4(d)(1)-(2).

Right away, the supposed conflict between the two evaporates. Section 208 grants the limited right to choose a personal voting assistor, but it creates no right to any particular *kind* of assistance, like anonymous assistance or paid assistance.[2] In Florida, for example, a person providing voting assistance must sign an oath swearing that his or her assistance complies with Florida law. FLA. STAT. ANN. §101.051(5). Some disabled Floridians might not get their first choice of assistor if that person demands anonymity, but that in no way raises preemption concerns.[3] In

[2] As Defendant acknowledged in his opening brief (at 42 n.9), States must accommodate disabled voters by affording them "meaningful access" to the ballot. *See Nat'l Fed'n of the Blind v. Lamone*, 813 F.3d 494, 507 (4th Cir. 2016) (citing *Alexander v. Choate*, 469 U.S. 287, 301 (1985)). Thus, a law that regulates only the form of voting assistance, yet so severely and unreasonably as to render that assistance ineffective, could conflict with federal law. That is not SB1.

[3] Florida's law has been on the books for twenty years with no issue.

principle, SB1 is no different. Alabama's law prohibits assistance-buying and assistance-selling; it does not tell voters whom they may and may not choose. Any person may assist a disabled Alabamian in need, just not in return for payment. Likewise, any person may assist a disabled Floridian, just not on the condition of anonymity. This "distinction" makes all the "difference." Pls.Br.42.

Even if outlawing a specific manner of assistance has the indirect, downstream consequence of removing some potential assistors from the pool, that effect would still not create an irreconcilable conflict with §208. Returning to the text, §208 begins with "any voter," later uses the phrase "a person," and follows up with "the voter." "Any," "a," and "the" each must be "given the meaning that proper grammar and usage would assign them." SCALIA & GARNER, READING LAW 140 (2012). "Any" means "one or some indiscriminately of whatever kind." *United States v. Gonzales*, 520 U.S. 1, 5 (1997). "A" refers to "some undetermined or unspecified particular." *McFadden v. United States*, 576 U.S. 186, 191 (2015). "The" denotes "that a following noun … is definite or has been previously specified by context." *Nielsen v. Preap*, 586 U.S. 392, 408 (2019).

With this in mind, §208 should be read to confer on *any* and all disabled, blind, and illiterate voters needing assistance the right to choose *a* person ("some undetermined or unspecified" person, *McFadden*, 576 U.S. at 191) for help navigating the voting process. Thus, so long as disabled voters may enlist *someone* of their choice

to help, their §208 right remains uninfringed. Had Congress intended something more expansive, it would have given disabled voters the right to assistance from *any person* or *the person* of their choice.

Plaintiffs, skipping over *McFadden*, declare that "a" means "any." Pls.Br.31. They cite *United States v. Alabama*, where "context" suggested that the statutory phrase "an election for Federal office" referred to "any Federal election," including runoff elections. 778 F.3d 926, 933 (11th Cir. 2015). Numerous contextual clues pointed to this result, including the statute's definitions of key terms along with surrounding textual indicators that Congress "knew how to" but did not "limit the scope" of the language at issue. *Id.* at 932-33.

Here, statutory context reveals that in §208, "a" means "a" and "any" means "any." The fact that Congress began §208 with "any voter" before using "a person" later in the sentence should be evidence enough that the two words carry distinct meanings. And §208 does not stand alone. Neighboring VRA provisions contain "compelling" textual evidence that Congress knew how to use the phrase *any person* when it wanted to, and so acted "intentionally and purposely," *id.* at 933, when inserting "*a person* of the voter's choice" in §208. *See* 52 U.S.C. §10101(c) ("any person"); *see also* §10307; §10308, §10311; §10313; §10505; §10506; §10701(b).

This reading does not render the phrase "of the voter's choice" superfluous, *contra* Pls.Br.31, for the simple reason that SB1 does not supplant the voter's choice

with the State's choice—the very issue §208 was enacted to address (and has long since solved). As Plaintiffs recount, "before 1982, Alabama and many other states permitted voters to receive assistance *only* from poll officials." Pls.Br.36. The disabled voter of that era could not choose an assistor; he was assigned one. Today, disabled Alabamians in need of assistance may choose someone, anyone, to help them vote. SB1's prohibition on buying and selling assistance does not usurp the voter's agency when choosing an assistor and, as such, does not conflict with §208.

Plaintiffs (and the United States) then lean heavily into the *expressio unius* canon to argue that the phrase "a person" encompasses *anyone* who's not the voter's employer or union representative, the two categories explicitly removed from the picture. Pls.Br.32; US.Br.14-15.[4] This interpretive canon applies only when "it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it," and it "can be overcome by contrary indications that adopting a particular rule or statute was probably not meant to signal any exclusion." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013) (quotation marks omitted).

[4] Plaintiffs' D.C. *amici* (including Hawaii) acknowledge that many state election laws exclude more than employers and union officials from assisting §208 voters. DC.Br.16 (*see, e.g.*, HAW. REV. STAT. §§11-139, 15-6). Nebraska, for example, apparently limits the assistor to a relative or "friend." NEB. REV. STAT. §32-918(1). *Amici* then declare, without explanation, that while these laws might burden a §208 voter's right to choose, they do not "unduly burden" that right. DC.Br.16. This is inconsistent with Plaintiffs' all-or-nothing view of §208, lending support to the view that §208 may have no plain meaning.

Here, context suggests that naming employer and union officials is "exemplary, not exclusive." *NationsBank of N.C., N.A. v. Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995). For one, Congress left unnamed multiple categories of persons posing a *greater* threat of manipulation than the two it named, such as foreign agents, political party operatives, candidates for office, convicted fraudsters, and those motivated by money, not altruism. If protecting disabled, blind, and illiterate voters from undue influence was the purpose of §208, *see* Pls.Br.20, then bestowing on these voters an unrestricted federal right to receive assistance from the most dubious of persons would seem, to put it mildly, counterproductive. The "negative inference" maxim may not be applied so "zealous[ly]" as to "effectively thwart the Act's policy" of protecting vulnerable voters from intimidation. *El Paso Nat'l Gas Co. v. Neztsosie*, 526 U.S. 473, 487 (1999). That would render §208 a "self-defeating statute," *Quarles v. United States*, 587 U.S. 645, 654 (2019), a result Defendant's interpretation avoids.

Finally, *OCA-Greater Houston v. Texas*, which Plaintiffs repeatedly invoke, stands only for the uncontroversial rule that "a state cannot restrict [a] federally guaranteed right by enacting a statute tracking its language, then defining terms more restrictively than as federally defined." 867 F.3d 604, 615 (5th Cir. 2017). The lone question presented in that case with respect to §208 was "how broadly to read the term 'to vote.'" 867 F.3d at 614; *accord OCA-Greater Houston v. Texas*, No. 1:15-

cv-679, 2016 WL 9651777, at *8 (W.D. Tex. Aug. 12, 2016). Texas argued "that the term refers only to the literal act of marking the ballot." *OCA*, 867 F.3d at 614. The Fifth Circuit disagreed, reciting the statutory definitions of the terms "vote" and "voting" as including "steps in the voting process before entering" and "after leaving the ballot box." *Id.* at 615 (citing 42 U.S.C. §10310(c)(1)) (emphasis omitted). The court did *not* address whether laws reasonably regulating the "right to choose" an assistor are preempted under §208—the issue presented here. Defendant does not propose that Alabama may "narrow[] the right guaranteed by Section 208 of the VRA," *id.*, nor dispute that §208's protections extend to absentee voting (and even applying to vote absentee). *See* Doc.42 at 44 n.20; Doc. 58 at 20; *see also* US.Br.20. Instead, Defendant contends that §208, by its plain text, confers a more modest, more logical, and less disruptive right than Plaintiffs and the district court envision. Section 208 grants certain persons the right to choose *a* trustworthy assistor. But it confers no right to paid assistance or to assistance from *any and every* person of the voter's choice.

2. Presented with all of that and more, the district court found the text ambiguous. Doc. 76 at 4.[5] Yet rather than refuse then and there to "infer preemption" in

[5] *See also* Doc. 69 at 50 ("'a person of the voter's choice,' is ambiguous"), 51 (noting "substantial disagreement about how to interpret Section 208"; "not convinced … the statutory text is even *plain*"), 51 n.12 ("not so sure" whether "a" is synonymous with "any"), 52 ("Even if the text … is not ambiguous (and, to be clear,

the face of "textual ambiguity" (as it should have), *White Buffalo Ventures v. Univ. of Tex. at Austin*, 420 F.3d 366, 372 (5th Cir. 2005), the court scoured the 1982 Senate report for some evidence of Congress's "clear and manifest purpose" to preempt, *Lawson-ross v. Great Lakes Higher Ed.*, 955 F.3d 908, 916 (11th Cir. 2020).

No matter what the court unearthed in the Senate report, the "Supremacy Clause cannot 'be deployed' 'to elevate abstract and unenacted legislative desires above state law.'" *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022) (quoting *Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 778 (2019) (lead op.)); *see also Kansas v. Garcia*, 589 U.S. 191, 208 (2020); *Bond v. United States*, 572 U.S. 844, 857-58 (2014); *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 599 (2011); *Altria Grp. v. Good*, 555 U.S. 70, 80 (2008). Courts interpret statutory text, not legislative "wishes." *McGirt v. Oklahoma*, 591 U.S. 894, 907 (2020). Only the former can be "entitled to preemptive effect." *Va. Uranium*, 587 U.S. at 778. Even the United States acknowledges that the district court erred in discerning Congress's clear intent to preempt SB1 from some source other than the text of §208. US.Br.31.

Plaintiffs bless the district court's maneuver, citing *Club Madonna Inc. v. City of Miami Beach*, 42 F.4th 1231 (11th Cir. 2022). There, a panel majority inferred from the text of the Immigration Control and Reform Act a congressional intent to

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it is), that text does not plainly indicate how this federal statute should operate with state laws governing election procedures (like SB 1).").

preempt a Miami employment-verification ordinance, and then glanced at the legislative history for confirmation. *Id.* at 1254. Because "the statutory text and …regulations were[] enough" to discern Congress's intent, the panel majority's jaunt into the history was unnecessary to its holding, and, as such, was dictum. *Id.*; *see also United States v. Gillis*, 938 F.3d 1181, 1198 (11th Cir. 2019) (defining dicta and collecting cases). Regardless, the idea that legislative history can communicate a clear and manifest purpose to preempt "directly conflict[s] with" Supreme Court precedent handed down before and after *Club Madonna*. *Gillis*, 938 F.3d at 1198; *see also supra*; *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 815 (2024). If this Court agrees with the district court that the text has no plain meaning, it must reverse.

3. Not only must courts refuse to "replace the actual text with speculation as to Congress' intent," *Castro-Huerta*, 597 U.S. at 642, they must avoid an interpretation, if at all possible, that would lead to "absurd result[s]." *Estrada*, 969 F.3d at 1264. The district court and Plaintiffs, however, embrace the absurd. Under their view, §208 constructs a "fixed universe" of assistors comprising *anyone* other than a voter's employer or union official. Pls.Br.34; Doc. 50 at 42, 46; Doc. 62 at 104:22, 107:1, 108:22-23, 117:7; Doc. 76 at 4-5; ECF 21 at 14. Lacking a "limiting principle," *Maracich v. Spears*, 570 U.S. 48, 60 (2013), this reading would sabotage

§208's mission of protecting vulnerable voters from intimidation and undue influence.

A State could not block campaign staffers with a record of orchestrating election-stealing schemes, like those in *Marks v. Stinson*, 19 F.3d 873 (3d Cir. 1994), and *Qualkinbush v. Skubisz*, 826 N.E.2d 1181 (Ill. App. Ct. 2004), from offering their "services" to illiterate voters. *See, e.g.*, DEL. STAT. Title 15 §§7550, 7557 (prohibiting election officials, candidates, and candidate's campaign staff from assisting). Nor could a State intervene to stop someone convicted of voter fraud from accompanying "voters with cognitive disabilities or memory impairments" "to remind them how they intended to vote." *La Union Del Pueblo Entero v. Abbott*, 2024 WL 4488082, *48 (W.D. Tex. Oct. 11, 2024). *See, e.g.*, TENN. CODE ANN. §2-7-116(d) (prohibiting "a person convicted of voter fraud in any state [from] assist[ing] a person in casting a vote"). And a State would be powerless to prevent candidates from canvassing nursing homes to help the infirm fill out their absentee ballots. *See, e.g.*, GA. CODE ANN. §21-2-385 (prohibiting candidate and candidate's close relatives from assisting).

Plaintiffs do not try to explain away the disturbing "textual consequences" required by their notion of §208's preemptive effect. READING LAW 352. Their only response is to "take no position." Pls.Br.51 n.18. Courts do not have that luxury. They must consider whether an interpretation has a plausible limiting principle, and

they "have a duty to accept the reading that disfavors pre-emption," *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 449 (2005). This "does not require that the problem-avoiding construction be the *preferable* one—the one the Court would adopt in any event." *Feltner v. Columbia Pictures Television*, 523 U.S. 340, 358 (1998) (Scalia, J., concurring). Rather, if the reading that disfavors preemption is "reasonable," *Hooper v. California*, 155 U.S. 648, 657 (1895), "plausible," *Pine v. City of West Palm Beach*, 762 F.3d 1262, 1270 (11th Cir. 2014), or "fairly possible," *I.N.S. v. St. Cyr*, 533 U.S. 289, 300 (2001), it must be adopted to uphold state law.

Defendant has offered a more than plausible reading of §208 that respects the text, avoids casting doubt on commonplace election laws, and steers clear of Plaintiffs' absurd results. The district court was "obligated" to accept that reading. *St. Cyr*, 533 U.S. at 300. It opted instead for one that gives convicted fraudsters free access to disabled voters. This Court should not make the same mistake.

B. SB1 does not "unduly burden" any voter's right to choose.

When holding SB1 in conflict with §208, the district court purported to employ an *undue burden* test discovered in the legislative history. These sorts of tests always require evidence of the law's burdens weighed against the legitimate interests the law advances. On this record, SB1 easily passes. But the district court performed no balancing and decried the need to examine evidence that SB1, in fact, burdens any §208 voter's right to choose an assistor. That amounts to an *any burden* test.

Congress has no constitutional authority to impose so impossible a standard on the States.

The Senate report's commentary on §208 contains this sentence: "State provisions would be preempted only to the extent that they unduly burden the right recognized in this section, with that determination being a practical one dependent upon the facts." S. Rep. 97-417, at 63. Even if this "abstract and unenacted legislative desire[]" could possibly communicate a "clear congressional instruction" to preempt, *Va. Uranium*, 587 U.S. at 775, 778, it contemplates that practical, fact-dependent inquiries will reveal some burdens on the right to choose an assistor that are due and some that are undue. The two examples of unduly burdensome procedures included by the Senate Judiciary Committee are instructive. First, "a procedure could not deny the assistance at some stages of the voting process during which assistance was needed," S. Rep. 97-417, at 63—think of the Texas law held preempted in *OCA*, 867 F.3d at 608. Second, a procedure "could not provide that a person could be denied assistance solely because he could read or write his own name," S. Rep. 97-417, at 63—hence, "*Any* voter who *requires* assistance …." 52 U.S.C. §10508 (emphasis added).

SB1 is nothing like these examples. It allows any disabled, blind, and illiterate person needing assistance at any point of the voting process to choose an assistor. It should go without saying that "not all burdens" on a federally protected right "are

forbidden," "only undue or discriminatory ones." *Nippert v. City of Richmond*, 327 U.S. 416, 426 (1946); *see also Planned Parenthood v. Casey*, 505 U.S. 833, 876 (1992) ("Not all burdens will be undue."). And because "every voting rule imposes a burden of some sort," "the size of the burden … is important." *Brnovich v. Democratic Nat'l Comm.*, 594 U.S. 647, 669 (2021). Even if SB1 created some burden for disabled voters, there is no evidence that the burden is sizable in its own right or undue when weighed against Alabama's legitimate interests.

1. The district court found that "there is no evidence that [SB1] has been (or will be) enforced in a discriminatory manner or that its aim is to inhibit some constitutionally protected conduct." Doc. 69 at 46. Likewise, the court accepted that "Section 208 voters perhaps can choose people not within the scope of SB 1 to assist them." Doc. 76 at 13 n.1. The fact that "[a]lternatives are available" strongly supports "[t]he conclusion that the Act does not impose an undue burden." *Gonzales v. Carhart*, 550 U.S. 124, 164 (2007).[6]

And Plaintiffs have never argued that SB1 "will prohibit the vast majority" of §208 voters from receiving necessary assistance from a person of their choice, or that paid assistance "is ever necessary." *Id.* at 156, 166. Thus, there can be no facial

[6] Even if, for the sake of argument, §208 confers a right to a voter's *first choice* from a "fixed universe" of assistors, would it constitute an undue burden if a law potentially required a voter to settle for his *second choice*, or *third choice*? Only a factual analysis of burdens balanced against interests could answer that question.

conflict between SB1 and §208. At the very most, there may be a conflict as applied to a particular disabled voter if that voter could find no one willing and able to provide unpaid assistance. Plaintiffs, however, opted to forego an as-applied challenge.

Instead, they decry the need to present "evidence of burden on voters." Pls.Br.44. But "concrete evidence" is always required to show "disparate burden." *See Brnovich*, 594 U.S. at 682-85; *cf. Fla. State Conf. of NAACP v. Lee*, 576 F. Supp. 3d 974, 990-91 (N.D. Fla. 2021) ("If Defendants are right that preemption turns on whether the challenged provision unduly burdens the voting rights of disabled voters, it would be nigh impossible to decide whether section 208 preempts Florida law without developing a factual record at trial."). Suggesting, alternatively, that their declarants' testimony is sufficient, Plaintiffs resurrect their failed vagueness arguments about what conduct SB1 does and does not prohibit. When dismissing their vagueness challenge, the district court correctly recognized that SB1's terms are "simple, straightforward" and "each have plain and ordinary meanings that are clearly understandable to persons of ordinary intelligence." Doc. 69 at 46-47.

Still, Plaintiffs insist that their declarants fear that caregivers, family, and neighbors face a reasonable risk of prosecution under SB1 because they are paid a wage or at one point received token gifts and trinkets from voter advocacy organizations. Pls.Br.45-46. This concocts confusion by ignoring the text of SB1, which "defines the line between potentially criminal conduct on the one hand and lawful"

assistance "on the other" by whether a person has knowingly given or received compensation for handling a voter's absentee ballot application in a specific manner. *Gonzales*, 550 U.S. at 149. SB1's text, like any law criminalizing bribery, need not contain the Latin "*quid pro quo*" to require "a specific intent to give or receive something of value *in exchange* for" an enumerated harvesting service. *United States v. Sun-Diamond Growers of Ca.*, 526 U.S. 398, 404-05 (1999). Thus, paying one's staff to distribute absentee ballot applications is clearly prohibited. *See* Pls.Br.39. But requesting and receiving help from a caregiver, mother, or neighbor, without more, is not.

Thus, SB1 poses no obstacle to Dr. Peebles' right to choose and receive assistance from his paid caregivers, whose wage is "not linked to any identifiable act" that has been specified as prohibited. *Sun-Diamond*, 526 U.S. at 406. For the same reason, SB1 does not prevent Ms. Faraino from getting help from her mother, or Messrs. Courie and McKee from pursuing assistance from their neighbor. Nor can probabilistic assumptions derived from the number of disabled, blind, and illiterate Alabamians satisfy Plaintiffs' evidentiary burden. Pls.Br.47 (asserting that "undoubtedly" some §208 are unduly burdened); *cf. Ga. Republican Party v. SEC*, 888 F.3d 1198, 1204 (11th Cir. 2018) (rejecting "probabilistic standing"). Plaintiffs' figures only underscore Alabama's legitimate and weighty interests in protecting vulnerable voters and shoring up elections against interference from bad actors.

2. The "prevention of fraud" is a "strong and entirely legitimate state interest," as is "[e]nsuring that every vote is cast freely, without intimidation or undue influence." *Brnovich*, 594 U.S. at 672. Despite Plaintiffs' *amici*'s assurances that "fraud in absentee vote-by-mail states is miniscule" and "rare," DC.Br.13, 22, it is undisputed that Alabama has experienced absentee voter fraud, *see* Op.Br.64, that absentee voter fraud is "difficult to detect," *Brnovich*, 594 U.S. at 685 (quoting Report of Comm'n on Fed. Election Reform, Building Confidence in U.S. Elections 46 (Sept. 2005)), and that "voter fraud may" still "be a problem" in Alabama, Doc. 69 at 42.

Plaintiffs' observation that Alabama can still go after fraudsters in no way diminishes the State's legitimate interest in deterring fraud before it occurs. *See League of Women Voters of Fla. v. Fla. Sec'y of State*, 81 F.4th 1328, 1333-34 (11th Cir. 2023) (en banc); *Brakebill v. Jaeger*, 905 F.3d 553, 560 (8th Cir. 2018). It just acknowledges a *separate* interest in prosecuting fraud after the fact, which necessarily deals "with only the most blatant and specific attempts of those with money to influence" vulnerable voters. *Buckley v. Valeo*, 424 U.S. 1, 27-28 (1976). Unable to enforce SB1, Defendant legitimately fears that more subtle efforts to manipulate the vote of Alabama's disabled citizens will proliferate. Plaintiffs' population estimates illustrate that the court's injunction gives paid ballot harvesters freer access to a broad swath of Alabama's electorate. Plaintiffs estimate that 30% of Alabamans are disabled while 24% are low literacy. Pls.Br.22. Unless every low literacy adult

is also disabled, the court's injunction leaves well *over* 30% of Alabama's voting population more susceptible to paid ballot harvesting operations than under SB1's enforcement. If §208 calls courts to balance burdens on voters with preventing intimidation, fraud, and undue influence, then SB1 is not preempted.

3. If, however, no balancing is required, and Plaintiffs are correct that "it is an undue burden *to limit*" (read: to burden in any way) "a 208 voter's choice of assistor," Pls.Br.44 (emphasis added); *see also* Doc. 76 at 11, then any burden is undue and §208 is unconstitutional. The court "should avoid such an interpretation" in favor of a plausible, constitutional alternative, like the one Defendant offers. *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1234 (11th Cir. 2005) (en banc).[7]

Defendant is not suggesting that granting handicapped and illiterate voters the right to choose *someone* to provide necessary voting assistance falls outside Congress's remedial powers "to prevent and deter unconstitutional conduct." *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 727-28 (2003). But Congress *cannot*, consistent with its authority to enforce the Reconstruction Amendments' substantive guarantees, require States to lay down while convicted fraudsters, partisans, and paid

[7] The canon of constitutional avoidance, triggered by the district court's view of §208 preemption, is a principle guiding this Court's interpretation and application of federal law, not an issue that can be waived on appeal. *Contra* Pls.Br.51. *See ECB USA, Inc. v. Chubb Ins. Co. of N.J.*, 113 F.4th 1312, 1321 (11th Cir. 2024) ("A party can no more waive or forfeit the canons for appellate purposes than it can waive or forfeit the existence of a precedent or the words of a statute.").

operatives canvas disabled absentee voters. *See City of Boerne v. Flores*, 521 U.S. 507 (1997).

Plaintiffs suggest (at Pls.Br.52) that different standards apply when deciding whether Congress exceeded its "parallel" enforcement powers under §5 of the Fourteenth Amendment or §2 of the Fifteenth Amendment. *Id.* at 518. There is no need to resolve this largely academic question, as their and the district court's reading of §208 "raise[s] serious constitutional questions under either test." *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 204 (2009).

Each of the VRA's "stringent remedies" must be "sufficiently related to the problem that it targets." *Id.* at 198, 203. Section 208 of the Voting Rights Act was enacted to address the practices in some States of prohibiting "*any* assistance from being given to illiterates," Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 565 (1973), and of letting some voters "receive assistance *only* from poll officials," Pls.Br.36. There is no "proportionality," *City of Boerne*, 521 U.S. at 520, or "rational" connection, *South Carolina v. Katzenbach*, 383 U.S. 301, 324 (1966), between the injuries identified in 1982 and the remedy of mandating that self-interested candidates, predatory fraudsters, and paid ballot harvesters be permitted to guide disabled, blind, and illiterate voters through the absentee voting process.

Plaintiffs contend that because the Supreme Court considered Title II of the ADA valid remedial legislation, this Court should do the same for their uncomfortably broad reading of §208. *See* Pls.Br.54. In *Tennessee v. Lane*, the Supreme Court held that Title II's "limited" requirement that States make "reasonable modifications" to public services and programs was "appropriately tailored to serve" Congress's objective "of enforcing the right of access to the courts." 541 U.S. at 530-32. Adding a ramp to a courthouse entrance bears no resemblance to granting partisans and persons convicted of voter fraud federally mandated access to disabled voters.

Finally, it must be remembered that the VRA is not "just like any other piece of legislation." *Shelby County v. Holder*, 570 U.S. 529, 555 (2013). The Supreme Court "has made clear … that the Voting Rights Act is far from ordinary." *Id.* At its inception, "the Act was 'uncommon' and 'not otherwise appropriate,' but was justified by 'exception' and 'unique' conditions." *Id.* (quoting *Katzenbach*, 383 U.S. at 334, 335). Thus, the Court has held that "*the Act* imposes current burdens and must be justified by current needs." *Nw. Austin*, 557 U.S. at 203 (emphasis added). The legislative and historical record contains no evidence of any current or past need that could conceivably justify the current burdens accompanying the district court's reading of §208.

C. SB1 permits submission assistance for Section 208 voters.

"When legislation and the Constitution brush up against each other," the court's "task is to seek harmony, not to manufacture conflict." *United States v. Hansen*, 599 U.S. 762, 781 (2023). SB1 requires that voters generally submit their own absentee ballot applications. ALA. CODE §17-11-4(c)(2). The district court held that provision unconstitutional because some disabled voters need help submitting their applications. Doc. 69 at 54. Anticipating that very scenario, SB1 states that "[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance." *Id.* §17-11-4(e). The court, inexplicably, treated that provision as "wholly superfluous." *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Plaintiffs argue that any harmonious reading would require "engrafting new terms," such as a clarification that SB1 "does not permit the prosecution of the chosen assistors of Section 208 voters." Pls.Br.41. First of all, no constitutional suspicion attaches to a statute just because its language is not organized and delineated precisely to a litigant's liking. Still, ghost-writing new language into SB1 is totally uncalled for; the Court need only give the terms *already* in the statute their "full effect." *United States v. McLymont*, 45 F.3d 400, 401 (1995). Plaintiffs then don blinders to suggest that while disabled voters may *receive* assistance under SB1, no one may *give* them that assistance without facing prosecution. Pls.Br.45. That silly

interpretation transforms the constitutional avoidance canon into one of "constitutional collision." *Hansen*, 599 U.S. at 781. And if Plaintiffs are right that §17-11-4(e)'s promise that disabled voters "may be given assistance" clearly protects only the assistee and not also the assistor, then §208's identical language should be read in the same miserly manner, defeating Plaintiffs' preemption claim.

Finally, because "a limiting construction has and can be placed on" SB1 to uphold a disabled voter's right to receive required assistance in submitting his application, *see* Op.Br.65, the court "should read it that way" to avoid preemption. *Henry v. Attorney General, Ala.*, 45 F.4th 1272, 1292 (11th Cir. 2022).[8] Of course, while not binding on this Court, the Attorney General's repeated and consistent interpretation of SB1 as permitting submission assistance for disabled voters is entitled to "great weight." *Douglas v. Roper*, 374 So. 3d 652, 671 (Ala. 2022). Far be it from Defendant to demand that the Court "defer" to his "views about the meaning of the state statute." *Stenberg v. Carhart*, 530 U.S. 914, 940 (2000). Nor does he suggest "twist[ing] the words of the law and giv[ing] them a meaning they cannot reasonably bear." *Id.* at 941. To the contrary, Defendant simply demonstrates that SB1 "*can be read* not to prohibit" submission assistance for §208 voters. *Henry*, 45 F.4th at 1292

[8] Like any other interpretive tool or canon, the narrowing construction canon cannot be waived on appeal. *ECB USA, Inc.*, 113 F.4th at 1321; *see also Sec'y, U.S. Dep't of Labor v. Preston*, 873 F.3d 877, 883 n.5 (11th Cir. 2017) ("Parties can most assuredly waive positions and issues on appeal, but not individual arguments—let alone authorities.").

(emphasis added). Because it *can*, standard principles of interpretation demand that it must in order to avoid serious constitutional concerns.

II. Irreparable Harm Must Be Proven, Not Presumed.

"A preliminary injunction requires more than a likelihood of success on the merits—much more." *Brown v. Sec'y, U.S. Dep't of HHS*, 4 F.4th 1220, 1225 (11th Cir. 2021), *vacated as moot*, 20 F.4th 1385 (11th Cir. 2021). A party demanding such "extraordinary relief" must show a "serious and immediate" threat of future injury. *Siegel v. LePore*, 234 F.3d 1163, 1177 (11th Cir. 2000) (en banc) (per curiam) (emphasis removed). Here, the district court presumed irreparable injury after denouncing the need to examine any evidence of harm. What little evidence appears in the record is insufficient as a matter of law for two reasons.

First, "this Court, sitting en banc, rejected the notion that the 'violation of constitutional rights always constitutes irreparable harm.'" *Brown*, 4 F.4th at 1225 (quoting *Siegel v. LePore*, 234 F.3d 1163, 1177 (11th Cir. 2000) (en banc) (per curiam)). That being the law of the circuit, Plaintiffs' and the district court's belief that the violation of a federal *statutory* right is *per se* irreparable harm cannot be true.

Pls.Br.56; Doc. 76 at 5-6. Even if Plaintiffs are likely to succeed on the merits, they still must come forward with evidence of "serious harm." *Siegel*, 234 F.3d at 1177.[9]

Second, while "missing the opportunity to vote in an election is" sufficiently serious, *Gonzalez v. Governor of Ga.*, 978 F.3d 1266, 1271 (11th Cir. 2020), a mere burden on the ability to vote is not. "No voter … claims that in this election he was prevented from registering to vote, prevented from voting or prevented from voting for the candidate of his choice." *Siegel*, 234 F.3d at 1177. Only voting cases "involv[ing] these kind of circumstances" may "warrant[] immediate injunctive relief." *Id.* This case is not one of those.

CONCLUSION

The Court should reverse.

[9] Plaintiffs cite *Charles H. Wesley Education Foundation v. Cox*, 408 F.3d 1349, 1355 (11th Cir. 2005), to suggest that their "missed opportunities to assist Section 208 voters also constitute irreparable harm." Pls.Br.56-57. Section 208 confers a right on certain voters needing assistance; it confers no right to assist on non-profit organizations or anyone else. Their only chance of demonstrating irreparable harm was to show that actual §208 voters would not be able to vote under SB1.

January 31, 2025

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CERTIFICATE OF COMPLIANCE

This motion complies with Rule 27 because it contains 6,464 excluding the parts that can be excluded. It also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

Dated: January 31, 2025

/s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.

CERTIFICATE OF SERVICE

I certify that on January 31, 2025, I electronically filed this document using the Court's CM/ECF system, which will serve all counsel of record.

s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.