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

DEFENDANTS-APPELLANTS' OPENING BRIEF

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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.

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STATEMENT REGARDING ORAL ARGUMENT

The district court preliminarily enjoined an important state law that restricts ballot harvesting—a practice that presents a substantial risk of election fraud. This case raises significant questions about the interpretation and scope of an important federal statute and about state authority to regulate elections. Oral argument would aid the Court in resolving the issues presented in this appeal.

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INTRODUCTION

The district court in this case broadly enjoined Senate Bill 2358, an important Mississippi law enacted to address the harms caused by ballot harvesting—the practice of a third party collecting and transmitting the mail-in ballots of other people. The court ruled that S.B. 2358 is likely 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. The court's order rests on serious errors of law and should be rejected.

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. Section 208 thus provides a right to voting assistance. But it does not provide a boundless right. Section 208 gives a voter a right to receive assistance from "*a* person of the voter's choice"—not an absolute right to receive assistance from *any person* or *the person* of the voter's choice. Section 208 itself expressly bars voters from receiving assistance from certain persons—their employer or union officials. And, consistent with the statute's aims of combatting voter manipulation and undue influence,

Section 208 leaves States leeway to reasonably regulate how assistance is provided—including by regulating who may provide that assistance.

Against that backdrop, and in light of the risks presented by absentee and mail-in voting, in 2023 the Mississippi Legislature enacted S.B. 2358, the statute challenged here. S.B. 2358 regulates who may collect and transmit mail-in ballots. S.B. 2358 generally bars someone from collecting and transmitting an absentee ballot that is mailed to another person. The statute aims to eradicate ballot harvesting—a practice that presents heightened risks of fraud. S.B. 2358 has a targeted scope. It applies only to collecting and transmitting a ballot. It does not affect a voter's ability to receive assistance with voting at any other stage—including filling out a ballot. And even at the collection-and-transmission stage, the law includes broad exceptions that allow many persons to provide assistance to voters who need it: election officials, postal workers, and common carriers, as well as a voter's family members, household members, and caregivers. Under S.B. 2358, then, a voter who wishes to receive "assistance to vote" may select "a person of the voter's choice" from a large universe of persons. 52 U.S.C. § 10508.

Yet the district court held that S.B. 2358 likely conflicts with and so is preempted by Section 208. In reaching that conclusion, the court declared (without analysis) that Section 208 guarantees blind, disabled,

and illiterate voters the right to seek assistance from "*any* person they want." ROA.335 (emphasis added). By narrowing a voter's choice of assistants at the ballot-collection-and-transmission stage, the court reasoned, S.B. 2358 conflicts with Section 208. The court thus granted preliminary injunctive relief against S.B. 2358's enforcement. The court did not limit that relief to the plaintiffs before it who had demonstrated standing and irreparable injury. Instead, the court entirely enjoined S.B. 2358's enforcement in 2023 elections and thereafter broadly enjoined the statute in situations involving voters covered by Section 208.

This Court should reject the district court's injunction.

Section 208 does not preempt reasonable state regulations of the right to voting assistance—including regulations of who may assist voters. Section 208's text, structure, and aims all confirm this. Section 208 allows voters to receive assistance from "a person" of their choice—not *any person* or *the person* of their choice. Congress's use of the indefinite article "a"—which contrasts with its use of the phrases "*[a]ny* voter" and "*the* voter[ ]" elsewhere in Section 208 itself—makes clear that a voter's choice may be limited. So too does Section 208's exclusion of a voter's employer and union officials from providing assistance. That exclusion rules out two particularly problematic categories of assistants—persons who present a heightened risk of exercising undue

influence over or manipulating a voter. And Section 208 leaves States leeway to rule out more categories of persons from providing assistance—so long as the voter is able to receive assistance from "a person" of the voter's choice. This understanding reflects Congress's aim of assuring meaningful voting assistance while minimizing the risks of voter intimidation and manipulation. And it is consistent with States' broad power to regulate elections, their authority to prohibit criminal activity, and the presumption against preemption. An absolutist view of Section 208 as providing a near unlimited right, by contrast, lacks a basis in statutory text, structure, or purpose. And it would lead to an absurd state of affairs where voters could demand assistance from violent criminals, fraudsters, complete strangers, or anyone else, and a State would be powerless to limit that choice. That is not what Section 208 does. Rather, Section 208 leaves States with authority to reasonably regulate how assistance is provided—including by regulating who may provide that assistance.

S.B. 2358 is the type of reasonable regulation that Section 208 leaves States free to adopt. It is a targeted regulation that addresses a particular practice (ballot harvesting) that presents serious risks of fraud and manipulation. It applies only to collecting and transmitting ballots: it does not limit or affect a voter's ability to receive assistance at any

other stage of the voting process. And even at the collection-and-transmission stage, the law exempts broad categories of persons who remain available to assist voters. S.B. 2358 advances compelling interests in combatting fraud, promoting election integrity, and protecting voters from undue influence and manipulation. Far from obstructing federal law, S.B. 2358 advances Section 208's core aims.

The district court did not meaningfully engage with Section 208's text, structure, or purpose or with important background principles that govern preemption claims. Instead, the court rested its injunction on the view that Section 208 guarantees a voter's choice of *any person* to provide assistance. The court did not acknowledge S.B. 2358's narrow application or the broad scope of voting assistance that remains available to voters following its enactment. The injunction thus rests on a profoundly flawed understanding of Section 208 and a failure to soundly assess S.B. 2358. On a correct view of both statutes, there is no basis for concluding that Section 208 likely preempts S.B. 2358. That is grounds enough for this Court to vacate the preliminary injunction: plaintiffs cannot succeed on the merits.

Even putting aside the district court's flawed view of the merits, the court's injunction cannot stand. The injunction should be rejected on the independent ground that it rests on a deeply mistaken assessment of

irreparable harm and the equities. In assessing those features, the district court elevated narrow and speculative alleged harms from S.B. 2358's enforcement (demonstrated at most as to individual plaintiffs) over the State's and the public's compelling interests in S.B. 2358's enforcement. And the court failed to adequately assess how its injunction would undermine election integrity and harm voters.

At the least, the injunction is vastly overbroad and must be significantly narrowed. The U.S. Constitution and equitable principles dictate that injunctive relief must be tailored to redress a particular injury and must be no broader than necessary to provide complete relief to plaintiffs with standing and a demonstrated irreparable injury. Thus, even if some injunctive relief were appropriate, the injunction the district court ordered is vastly overbroad. The court broadly enjoined S.B. 2358's enforcement and effectively awarded class-wide injunctive relief to persons who never showed the minimal demands of Article III standing—let alone satisfied the rigorous requirements of class certification. At most the injunction can stand as to the individual plaintiffs in this case. The injunction should be vacated otherwise.

STATEMENT OF JURISDICTION

The district court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343. On July 25, 2023, the district court entered an order

preliminarily enjoining S.B. 2358's enforcement. ROA.332-338. On August 25, 2023, defendants filed a timely notice of appeal. ROA.339-340. This Court has jurisdiction under 28 U.S.C. § 1292.

STATEMENT OF THE ISSUES

I. Section 208 of the Voting Rights Act provides that certain voters may be given assistance with voting by "a person" of their choice. Mississippi Senate Bill 2358 generally prohibits third parties from collecting and transmitting absentee ballots, but allows broad categories of persons to assist voters who need help. Did the district court err in enjoining S.B. 2358's enforcement on the ground that it conflicts with and so is preempted by Section 208?

II. S.B. 2358 advances compelling state interests in election integrity while protecting voters from undue influence and manipulation. Did the district court err in holding that the balance of harms and the public interest nevertheless favor enjoining S.B. 2358's enforcement—including against persons who are not parties to this suit, have not shown that they possess standing to sue, and have not demonstrated that S.B. 2358 will cause them irreparable injury?

STATEMENT OF THE CASE

Legal Background. Congress enacted the Voting Rights Act of 1965 "to banish the blight of racial discrimination in voting." *South*

Carolina v. Katzenbach, 383 U.S. 301, 308 (1966). Congress has amended the VRA several times, largely with that same focus of preventing racial discrimination. But in 1982 Congress added a standalone provision with a different focus: assisting blind, disabled, and illiterate voters. That provision, Section 208, provides in full: "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." Pub. L. No. 97-205, 96 Stat. 131, 135 (1982) (codified at 52 U.S.C. § 10508).

Section 208 was "prompted by concerns raised by the National Federation of the Blind." Thomas M. Boyd & Stephen J. Markman, The 1982 Amendments To The Voting Rights Act: A Legislative History, 40 Wash. & Lee L. Rev. 1347, 1419 n.357 (1983). The Federation told Congress that blind voters generally need assistance to vote, including in the voting booth. At the time, such assistance was provided largely by election workers and party officials. That state of affairs "infringe[d]" voters' "right to a secret ballot" and "discourage[d] many from voting for fear of intimidation or lack of privacy." S. Rep. No. 97-417, at 62 n.207 (1982) (citing Letter from James Gashel, National Federation of the Blind, to Senator Metzenbaum, April 27, 1982).

These concerns applied to other groups too. The Senate Judiciary Committee report accompanying the 1982 amendments explained that "[c]ertain discrete groups of citizens"—namely "the blind, the disabled, and those who either do not have a written language or who are unable to read or write"—often "are unable to exercise their rights to vote without obtaining assistance." S. Rep. No. 97-417, at 62. "Because of their need for assistance," such citizens were "more susceptible than the ordinary voter to having their vote unduly influenced or manipulated." *Ibid*. And they risked "hav[ing] their actual preference overborne by the influence of those assisting them or be[ing] misled into voting for someone other than the candidate of their choice." *Ibid.* The Committee concluded that blind, disabled, and illiterate voters should have voting assistance from "a person of their own choice" rather than from a poll worker who has been forced on them. *Ibid.* In this way, a voter could receive assistance from "a person whom the voter trusts and who cannot intimidate him." *Ibid.*

Section 208 does not specify the scope of assistance to which a voter is entitled or how that assistance is to be provided. And it does not guarantee assistance by any person the voter may choose. It entitles a voter to "assistance by *a* person of the voter's choice." 52 U.S.C. § 10508 (emphasis added). Indeed, Congress immediately excluded two categories

of persons from those a voter could select. A voter may not receive assistance from his "employer" or an "officer" in his union, *ibid.*—persons who present the risk of "undu[e] influence[ ]" and "manipulat[ion]" that animated Section 208. S. Rep. No. 97-417, at 62. As with the leeway it leaves to States on many issues of elections and voting, Congress otherwise left States to regulate how and by whom the assistance guaranteed by Section 208 may be provided. States thus have the authority "to establish necessary election procedures" on voting assistance, "subject to the overriding principle that such procedures shall be designed to protect the rights of voters" and "encourage[ ] greater participation in our electoral process." *Id.* at 62-63. State laws "would be preempted" by Section 208 "only to the extent that they unduly burden the right recognized in [Section 208], with that determination being a practical one dependent upon the facts." *Id.* at 63.

Factual Background. This case concerns the intersection of Section 208 and Mississippi law.

Mississippi law prioritizes in-person voting, but accounts for the challenges that such voting presents for some voters. Miss. Code Ann. tit. 23, ch. 15. State law permits certain persons to vote absentee and some absentee voters to vote by mail. *Id.* §§ 23-15-713, 23-15-715. Eligible

mail-in voters include those with "a temporary or permanent physical disability." *Id.* §§ 23-15-713(d), 23-15-715(b).

In line with Section 208, Mississippi allows blind, disabled, or illiterate voters to receive assistance with voting. Miss. Code Ann. §§ 23-15-549, 23-15-631. When they vote by mail, such voters "shall be entitled to receive assistance in the marking of [their] absentee ballot and in completing the affidavit on the absentee ballot envelope." *Id.* § 23-15-631(1)(f). To help "ensure the integrity of the ballot," the person providing such assistance must "sign and complete [a] 'Certificate of Person Providing Voter Assistance' on the absentee ballot envelope." *Ibid.*

These actions broadening mail-in voting come with risks. As mail-in voting broadens, so too do the prospects of voter fraud and manipulation that come with it. "[V]oter fraud" has occurred "throughout this Nation's history" and is a perennial "risk" in elections. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 195, 196 (2008) (plurality opinion). Mississippi has faced those risks. The many cases of voter fraud in the State have ranged from buying votes to manipulating absentee voters and ballots. Heritage Foundation, Election Fraud Cases—Mississippi, https://herit.ag/3Me8ktT (detailing dozens of voter-fraud cases in Mississippi between 1993 and 2021). Consistent with the State's responsibility to safeguard election integrity and ensure that lawful votes

are "protected from the diluting effect of illegal ballots," *Gray v. Sanders*, 372 U.S. 368, 380 (1963), Mississippi has several laws addressing election fraud. *E.g.*, Miss. Code Ann. §§ 23-15-751, 23-15-753; Miss. Code Ann. tit. 97, ch. 13.

Fraud is a particular concern in absentee and mail-in voting. The bipartisan Commission on Federal Election Reform co-chaired by former President Jimmy Carter and Secretary of State James A. Baker, III has observed that "[a]bsentee ballots remain the largest source of potential voter fraud." Comm'n on Fed. Election Reform, Building Confidence in U.S. Elections 46 (2005). "[T]he potential and reality of fraud is much greater in the mail-in ballot context," "particularly among the elderly." *Veasey v. Abbott*, 830 F.3d 216, 239, 263 (5th Cir. 2016) (en banc); *see Ruhl v. Walton*, 955 So. 2d 279, 282 (Miss. 2007) (Mail-in ballots "are particularly amenable to fraud.") (quotations omitted). This is because ballots sent by mail "might get intercepted," citizens who vote away from polling places "are more susceptible to pressure" or "intimidation," and "[v]ote buying schemes are far more difficult to detect" away from the watchful eyes of election officials. Building Confidence 46; *see Watson v. Oppenheim*, 301 So. 3d 37, 43 (Miss. 2020) ("[A]bsentee voting takes place in a private setting where the opportunity for fraud is greater.") (quotations omitted).

The Mississippi statute challenged here, Senate Bill 2358, represents a legislative effort to ensure that voters receive needed assistance with voting while addressing the persistent risk of voter fraud and manipulation associated with mail-in ballots.

Enacted in March 2023, S.B. 2358 limits the circumstances in which third parties may collect and transmit ballots—a practice known as ballot harvesting. S.B. 2358 provides a general rule: "A person shall not knowingly collect and transmit a ballot that was mailed to another person." S.B. 2358 § 1(1). Violations of that prohibition are misdemeanors punishable by up to one year in jail, a fine up to $3,000, or both. *Id.* § 1(2). S.B. 2358 exempts from its general prohibition several broad categories of persons who remain able to assist a voter with "collect[ing] and transmit[ting]" a ballot. *Id.* § 1(1). It exempts: "[a]n election official while engaged in official duties"; "[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). Ballot collection by such individuals "does not constitute [unlawful] ballot harvesting" under the law. *Id.* (title) (capitalization omitted). S.B. 2358 also leaves untouched Mississippi's

voter-assistance provisions noted above, which, among other things, permit blind, disabled, and illiterate voters "to receive assistance in the marking of [their] absentee ballot and in completing the affidavit on the absentee ballot envelope." Miss. Code Ann. § 23-15-631(1)(f). S.B. 2358 was to take effect on July 1, 2023.

Procedural History. On May 31, 2023, two organizations and three individuals filed this lawsuit challenging S.B. 2358. ROA.17-38.

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 says 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. DRMS operates a voting-assistance hotline and conducts disability-rights presentations. ROA.24. LWV-MS is a non-profit advocacy group that says that it "conducts voter service and education activities." ROA.25. These activities include "educating voters on how to vote absentee by mail." ROA.25. LWV-MS alleges 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 claims 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 allege 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 claim to fear prosecution under S.B. 2358. ROA.26. Mr. Whitley alleges that he is a disabled voter who has relied on assistance from Ms. Cunningham and Ms. Gunn to mail his absentee ballot in past elections and wishes to continue doing so. ROA.26-27.

Plaintiffs claim that Section 208 of the VRA preempts S.B. 2358. They contend that Section 208 gives blind, disabled, and illiterate voters the "right to seek assistance" with "deliver[ing] their ballot" "from anyone" other than a voter's employer or union officials. ROA.34. They maintain that S.B. 2358 "reverses 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 argue, S.B. 2358 "directly conflicts with" and is preempted by Section 208. ROA.22. Plaintiffs sought pre-enforcement preliminary injunctive relief on their claim, to bar state officials "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 persons of their choice, except as prohibited by Section 208." ROA.39-40.

On July 25, 2023, the district court ruled that S.B. 2358 likely conflicts with Section 208 and granted broad injunctive relief against S.B. 2358's enforcement. ROA.332-338.

On standing, the court noted that defendants "d[id] not dispute" the individual plaintiffs' standing. ROA.335; *see* ROA.190 n.2 (defendants' representation that "the individual plaintiffs' standing should be taken as true for purposes of [the preliminary-injunction] motion only"). The court did not address the organizational plaintiffs' standing. *See* ROA.335-336 (ruling that presence of one party with standing was sufficient).

On the merits, 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 (invoking *OCA-Greater Houston v. Texas*, 867 F.3d 604, 607, 614 (5th Cir. 2017)). And the court reasoned that S.B. 2358's "broad and vague nature" and lack of "guideposts" make it difficult to "ascertain" whether assistants like two of the individual plaintiffs would fall within the statute's exception for family members, household members, and

caregivers. ROA.336, 337. The court maintained that S.B. 2358's "criminal penalties" "would deter eligible absentee voters" in upcoming elections. ROA.337.

On the equities, the district court acknowledged Mississippi's "compelling interest in preserving the integrity of its election process." ROA.332. But it said that S.B. 2358 was unaccompanied by "fact-findings," "investigations," or "legislative committee inquiries" on the "perceived threat" of ballot harvesting. ROA.337.

The court enjoined defendants "from applying [S.B. 2358] in connection with 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 also "requested that the Mississippi Secretary of State assist [the] court in the dissemination of information to the public clarifying [the] court's [order] and its effect on S.B. 2358." ROA.338. The court promised to issue at some future point "a more detailed Memorandum Opinion and Order, with additional facts and law." ROA.338. No such opinion and order has issued to date.

Defendants timely appealed. ROA.339-340.

SUMMARY OF ARGUMENT

I. This Court should vacate the district court's preliminary-injunction order. Section 208 of the Voting Rights Act does not preempt Mississippi's ballot-harvesting law, S.B. 2358.

A. Section 208 entitles blind, disabled, and illiterate voters to voting assistance, but it leaves States significant leeway to reasonably regulate how and from whom those voters may receive assistance. Section 208 allows voters to receive assistance from "a person" of their choice—not *any person* or *the person* of their choice. Congress could have adopted a boundless right or vested absolute discretion in voters, but it did not do so. Instead, Congress made clear that voters could under no circumstances receive assistance from certain persons—their employers or union officials—and left States room to rule out other persons from providing assistance. So long as voters have the ability to make the ultimate choice of who will assist them, Section 208 poses no barrier to a reasonable state regulation limiting who may provide assistance. That view aligns with Section 208's aims of assuring meaningful voting assistance while minimizing the risks of undue influence and manipulation. It is also supported by background principles on the primacy of States in regulating elections, the overriding commands of federalism, and the limits on preemption.

In assessing Section 208's preemptive effect, the district court did not meaningfully engage with Section 208's text, structure, or purpose, or with key background principles. Instead, the court declared that Section 208 has a sweeping, absolutist scope. That view is irreconcilable with the points set out above, has no support in the one case on which the district court relied for it, and leads to absurd results.

B. S.B. 2358 reasonably regulates the right to voting assistance and is the type of regulation that Section 208 leaves States free to adopt. S.B. 2358 is a targeted law that addresses a specific practice (ballot harvesting) that presents a significant risk of fraud and manipulation. The law applies only to collecting and transmitting absentee ballots. It does not limit or even affect voters' ability to receive assistance at any other stage of the voting process. And even at the collection-and-transmission stage, the law allows voters to receive assistance from a vast universe of persons. While S.B. 2358 imposes only minimal burdens on the right to voting assistance, it serves compelling state interests in combatting fraud, promoting election integrity, and protecting voters from undue influence and manipulation. In doing so, S.B. 2358 advances the purposes and objectives of Congress reflected in Section 208.

The district court did not acknowledge S.B. 2358's narrow application or the broad scope of voting assistance it preserves. It erred

in ruling that Section 208 likely preempts S.B. 2358. The injunction should be vacated because plaintiffs cannot prevail on the merits of their sole claim.

II. The preliminary-injunction order also cannot stand because it rests on a profoundly erroneous assessment of the equities and grants relief that is, at minimum, vastly overbroad.

A. The equities defeat any claim for injunctive relief. Enjoining S.B. 2358's enforcement will profoundly harm compelling state interests and undermine the public interest. The State has a compelling interest in preserving election integrity and in enforcing duly enacted laws reflecting the will of its citizens. The district court wrongly minimized the State's interest in combatting ballot harvesting. Fraud is a significant risk that accompanies mail-in voting. And the State's interest in preserving election integrity is one that voters share, since voter fraud reduces confidence in elections and discourages participation in our democracy. Plaintiffs' showing on harm and the equities—which rested on a showing of only one plaintiff voter who claimed a risk of being denied assistance—cannot remotely overcome the harms to the State and the public. The equities require rejecting injunctive relief.

B. Even if this Court concludes that some injunctive relief against S.B. 2358's enforcement is warranted, the relief the district court ordered

is vastly overbroad. Article III and equitable principles dictate that injunctive relief must be tailored to redress a proven injury and must be no broader than necessary to provide complete relief to plaintiffs with standing and a demonstrated irreparable injury. Plaintiffs did not remotely make a showing that warranted the wide-ranging relief that the district court ordered, which broadly enjoined S.B. 2358's enforcement in situations involving voters covered by Section 208. Any injunctive relief should be limited to individual plaintiffs (that is, actual parties before the court) who have demonstrated that S.B. 2358's enforcement would irreparably harm them. At most, on this record that means the injunction can extend to the three individual plaintiffs.

STANDARD OF REVIEW

"A preliminary injunction is an extraordinary remedy." *Planned Parenthood of Greater Texas v. Kauffman*, 981 F.3d 347, 353 (5th Cir. 2020) (en banc) (quotations omitted). A movant must show: "(1) a substantial likelihood of success on the merits; (2) a substantial threat of irreparable harm if the injunction is not granted; (3) that the threatened injury outweighs any harm that the injunction might cause to the defendant; and (4) that the injunction will not disserve the public interest." *Willey v. Harris Cnty. Dist. Att'y*, 27 F.4th 1125, 1129 (5th Cir. 2022) (quotations omitted).

This Court "review[s] the district court's ultimate decision to grant or deny a preliminary injunction for abuse of discretion," but it reviews "a decision grounded in erroneous legal principles de novo." *City of Dallas v. Delta Air Lines, Inc.*, 847 F.3d 279, 286 (5th Cir. 2017) (quotations omitted). "The preemptive effect of a federal statute is a question of law" that is "review[ed] *de novo*." *Franks Inv. Co. LLC v. Union Pac. R. Co.*, 593 F.3d 404, 407 (5th Cir. 2010) (en banc). "The burden of persuasion in preemption cases lies with the party seeking annulment of the state statute." *Greenwich Ins. Co. v. Mississippi Windstorm Underwriting Ass'n*, 808 F.3d 652, 655 (5th Cir. 2015) (quotations omitted).

ARGUMENT

I. This Court Should Vacate The Preliminary-Injunction Order Because Section 208 Of The Voting Rights Act Does Not Preempt Mississippi's Ballot-Harvesting Law, S.B. 2358.

The district court ruled that Mississippi's ballot-harvesting law, S.B. 2358, is likely preempted because it conflicts with the right to voting assistance recognized in Section 208. The district court erred.

A. Section 208 Permits States To Reasonably Regulate The Right To Voting Assistance.

The district court enjoined S.B. 2358's enforcement based on the claim that the statute "conflicts with and frustrates the purpose of federal law"—Section 208 of the VRA. ROA.334; *see* ROA.62-63. That ruling rests

on the district court's belief that Section 208 guarantees a "right" to blind, disabled, and illiterate voters "to seek assistance from '*any* person they want,' with only two specific exceptions [for a voter's employer and union]." ROA.335 (emphasis added). Based on that view of Section 208, the court ruled that S.B. 2358 would "deter otherwise lawful assistors from providing necessary aid" to voters. ROA.333.

The district court fundamentally misunderstood Section 208. Although Section 208 entitles certain persons to voting assistance, the statute leaves significant leeway for States to reasonably regulate how and from whom those persons may receive assistance.

1. Plaintiffs bring one claim: that Section 208 impliedly preempts S.B. 2358. *See*, *e.g.*, ROA.62. The "ultimate touchstone" for an implied-preemption claim is the "purpose of Congress," derived from the statutory "text," the "statutory framework," and a "reasoned understanding of the way in which Congress intended the statute and its surrounding regulatory scheme" to function. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485-86 (1996) (quotations omitted). Here, those features confirm that Congress left States the authority to reasonably regulate the right to voting assistance—including by regulating who may assist voters. Section 208 does not guarantee a boundless right to voting assistance.

The statute allows voters choose a person to assist them with voting, but it does not grant the right to make that choice without limitation.

Start with text. Section 208 provides: "Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508. By its plain terms, Section 208 provides a right to certain voters to receive assistance in voting. But it does not provide a boundless right. It provides a right to receive assistance from "*a* person of the voter's choice." It does not provide a right to receive assistance from *any person* or *the person* of the voter's choice—formulations that would have provided a more sweeping right.

The indefinite article "a" makes clear that a voter's choice is not unlimited. "When used as an indefinite article, 'a' means some undetermined or unspecified particular." *McFadden v. United States*, 576 U.S. 186, 191 (2015) (quotations omitted). If Congress wanted to adopt a boundless right to assistance, it could have said *any person of the voter's choice*. After all, *any* "has an expansive meaning, that is, one or some indiscriminately of whatever kind." *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (quotations omitted). Or Congress could have said *the person of the voter's choice*: that would have showed an intention to vest absolute

discretion in the voter. Congress did not do either of those things. Congress provided a right to receive assistance from "*a* person" of the voter's choice. Congress thus indicated that "some state law limitations on the identity of persons who may assist voters is permissible." *Priorities USA v. Nessel*, 628 F. Supp. 3d 716, 733 (E.D. Mich. 2022) (quotations omitted). Respect for text requires reading Section 208 to leave States leeway to regulate who that person may be, rather than reading Section 208 to confer a boundless choice.

Statutory structure confirms this. Section 208 includes both the phrases "[a]ny voter" and "the voter[ ]." So Congress showed that it knew to use the expansive *any* or the absolute *the* when it wanted to sweep broadly. It did not do that when it identified the scope of the assistance to which a voter is entitled: it referred to "a" person, leaving States room to reasonably regulate the universe of persons from whom a voter may receive assistance. Congress also included specific limitations on the right to assistance, further showing that the right it protects is limited. Section 208 excludes two categories of persons—the voter's employer and union officials—from serving as assistants, due to self-evident concerns about undue influence over the voter. By coupling those exclusions with the phrase "a person" (again, rather than *any person* or *the person*) in

describing the voter's choice, Congress left it to States to adopt further exclusions when necessary to protect voters.

This view of Section 208 promotes the provision's purposes. Section 208 reflects Congress' dual aims to "assure meaningful voting assistance and to avoid possible intimidation or manipulation of the voter." S. Rep. No. 97-417, at 62. Section 208 thus provides a right to assistance and ensures that voters are ultimately responsible for choosing (and may choose) their assistants. At the same time, Section 208 mitigates the risk of undue influence by barring certain groups (employers and union officials) from providing assistance and by leaving States leeway to adopt further regulations. In this way, Congress allowed certain voters to receive assistance while ensuring that uniquely "susceptible" voters are protected from "hav[ing] their actual preference overborne by the influence of those assisting them." *Ibid.*

Indeed, Congress expected that States would exercise their "legitimate" authority "to establish necessary election procedures" that carry through Section 208's aims. S. Rep. No. 97-417, at 63. It envisioned that States would "establish[ ]" reasonable regulations that "encourage[ ] greater participation in our electoral process" and "protect the rights of voters." *Id.* at 62-63. The "rights of voters" (*id.* at 63) include not only the right to assistance, but also the rights of all voters—including those

covered by Section 208—to have their votes "protected from the diluting effect" of votes tainted by fraud or manipulation, *Gray v. Sanders*, 372 U.S. 368, 380 (1963), and to be shielded from "confusion and undue influence" when casting their own ballots, *Burson v. Freeman*, 504 U.S. 191, 199 (1992).

Three background principles support the view of Section 208 that text, structure, and purpose all command. *First*, under our constitutional design, "[S]tates are responsible for regulating the conduct of their elections." *Voting for Am., Inc. v. Steen*, 732 F.3d 382, 387 (5th Cir. 2013). Although the federal government too may exercise "significant control over federal elections," *Shelby Cnty. v. Holder*, 570 U.S. 529, 543 (2013), States retain "broad powers to determine the conditions under which the right of suffrage may be exercised." *McDonald v. Bd. of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969) (quotations omitted). This structural feature of our constitutional system supports reading Section 208 to leave States the authority to reasonably regulate voting assistance.

Second, state laws addressing voter fraud and manipulation not only implicate the States' power to regulate elections but also their "traditional ... responsibility" to deter and punish crime. *Bond v. United States*, 572 U.S. 844, 858 (2014). "[T]he punishment of local criminal activity" is "[p]erhaps the clearest example of traditional state authority."

Ibid. Thus "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" "the usual constitutional balance of federal and state powers" in this context. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quotations omitted). This further supports reading Section 208 to leave States with leeway to adopt regulations that protect voters from election crimes.

Last, "[p]rinciples of federalism" dictate that when the text of a federal statute "'is susceptible of more than one plausible reading,'" courts should "'ordinarily accept the reading that disfavors pre-emption.'" *Ass'n of Taxicab Operators USA v. City of Dallas*, 720 F.3d 534, 537-38 (5th Cir. 2013) (quoting *Altria Grp., Inc. v. Good*, 555 U.S. 70, 77 (2008)). "In all pre-emption cases," and "particularly" where (as here) "Congress has legislated ... in a field which the States have traditionally occupied," courts "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Medtronic*, 518 U.S. at 485 (quotations omitted). This is because preemption interferes with the States' role as "independent sovereigns in our federal system," *ibid.*, and overrides the democratic will of a State's citizens, *Steen*, 732 F.3d at 387. As already explained, Section 208 clearly leaves States with authority to reasonably regulate voting assistance. But if there were any doubt about

that, principles of federalism would require avoiding a view of Section 208 that overrides reasonable state regulation.

In sum: Text, structure, purpose, and governing principles confirm that Section 208 allows voters "to choose a person who will assist" them, "but it does not grant [voters] the right to make that choice without limitation." *Ray v. Texas*, No. 2-06-CV-385, 2008 WL 3457021, at *7 (E.D. Tex. Aug. 7, 2008). By allowing assistance from "a person of the voter's choice," Congress ensured that the voter (and not the government, election workers, or campaign officials) would make the ultimate choice to receive assistance. And it preserved States' ability to regulate that assistance, so long as they do so reasonably.

2. In ruling on preemption, the district court did not assess text, structure, purpose, or the background principles set forth above. Instead, the court declared (without analysis) that Section 208 guarantees voters an unfettered choice of assistant. As explained above, that is wrong.

Rather than undertake a preemption analysis, the district court invoked *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017), and 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,'" other than their employer or union officials. ROA.335 (quoting *OCA*, 867 F.3d at 614). But

that is not what *OCA* held. *OCA* held that Section 208's guarantee of voting assistance extends to assistance outside the voting booth, and thus rejected the argument that the guarantee is limited to assistance inside the voting booth. *OCA*, 867 F.3d at 614-15. The Texas law at issue in that case allowed non-English-speaking voters to receive interpretation assistance "outside the ballot box." *Id.* at 608. But it limited a voter's choice of interpreters to other voters registered in the same county. *Ibid.* In defending against a preemption challenge, Texas argued that the term "to vote" as used in Section 208 "refers only to the literal act of marking the ballot." *Id.*at 614. As a result, Texas claimed, assistance "beyond the ballot box" was "beyond Section 208's coverage." *Ibid.* The Court rejected that argument. The "question presented," the Court said, was "how broadly to read the term 'to vote' in Section 208 of the VRA." *Ibid.* The Court observed that the VRA "expressly define[s]" the term "vote" to include actions outside the voting booth that are "'necessary to make a vote effective.'" *Ibid.* (quoting 52 U.S.C. § 10310(c)(1)). Because Texas "defin[ed]" *vote* "more restrictively than" the VRA, the Court ruled that the interpreter law "impermissibly narrow[ed] the right guaranteed by Section 208" and was preempted. *Id.* at 615.

The district court here did not invoke *OCA*'s holding or reasoning. Instead, the district court relied on the *OCA* Court's description of the

OCA plaintiff's preferred interpretation of Section 208. 867 F.3d at 614 (*"Under OCA's reading*, 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.") (emphasis added); *see* ROA.335. The *OCA* Court did not embrace that view of Section 208 in holding that Texas's definition of "vote" conflicted with the VRA's definition. And the Court did not address (let alone decide) whether all state restrictions on who may assist voters are impermissible, which is the relevant question here.

The district court's view of Section 208 thus rests on inapposite language from *OCA*. That view is irreconcilable with text, structure, purpose, and background principles. It cannot support the injunction that the district court ordered.

3. Plaintiffs maintain that Section 208 gives blind, disabled, and illiterate voters the right to seek assistance "from *anyone*" other than a voter's employer or union officials and that S.B. 2358 conflicts with that guarantee by limiting who may provide assistance. ROA.34 (emphasis added). Plaintiffs' arguments are unavailing.

First, plaintiffs have argued that Section 208's guarantee of assistance from "a person of the voter's choice" means *any person of their choice*. *E.g.*, ROA.66, 233. They contend that "the indefinite article 'a' is

often purposefully used as a synonym for the word 'any,'" and thus Section 208 should be read to guarantee voters the "right to select any person of their choice." ROA.233, 234 (quotations omitted); *see* ROA.234-235. It is true that *a* can be used as a synonym for *any*. But context matters. *Nixon v. Missouri Mun. League*, 541 U.S. 125, 132 (2004) ("'any' can and does mean different things depending upon the setting"). Here, Congress used the phrase "*a* person of the voter's choice" in the same provision that includes "[a]ny voter" and "the voter[ ]." 52 U.S.C. § 10508 (emphasis added); *cf. United States v. Alabama*, 778 F.3d 926, 933 (11th Cir. 2015) (cited by plaintiffs at ROA.234) (the meaning of an indefinite article depends on "the context of a statute"). That context dooms plaintiffs' view: "*a* person" does not mean *any person* or *the person* in Section 208.

Plaintiffs have relatedly said that "'*a* person of the voter's choice'" is "*more* capacious than" "'*the* person of the voter's choice,'" "thus giving voters *greater* choice." ROA.235. This argument undermines plaintiffs' position. That "*a* person of the voter's choice" is "more capacious" than "*the* person of the voter's choice" suggests that voters need only be assisted by *someone* of their choice to satisfy Section 208, and not (as plaintiffs maintain) their "preferred" or "unfettered" choice. ROA.65, 232; *cf.* ROA.235 (quoting *Mixon v. One Newco, Inc.*, 863 F.2d 846, 850 (11th

Cir. 1989), for the proposition that "'*a* period of seven years' as opposed to '*the* period' indicates that *any* seven-year period ... would suffice").

It is telling that plaintiffs repeatedly avoid Section 208's actual language (*a person*) when advancing their view of the statute and even when requesting relief. *E.g.*, ROA.50 (claiming that Section 208 guarantees voters the "right to seek assistance from '*any* person they want,' with only specific exceptions"); ROA.57 ("Section 208 guarantees" "assistance from *the* person of [the voter's] choice"); ROA.40 (requesting an order that voters "may continue to seek assistance from *any* person of their choice") (emphases added). That says the quiet part out loud: that "a" and "any" (and "the") do not mean the same thing here, that Congress deliberately chose "a," and that this choice defeats plaintiffs' position.

Second, plaintiffs have argued that the only permissible "restrictions" of voting assistants that Section 208 allows are the statute's "exclusions" of a voter's employer and union officials. ROA.35, 232; *see* ROA.64-65. But that view also does not harmonize with statutory text and structure. If Congress wanted the employer and union exclusions to be the only limitations on a voter's choice of assistant, it would have framed Section 208 as guaranteeing a categorical right to receive assistance from *any person other than an employer or union official*. It did not do so. As explained above, when considered in light of Section

208's broader text and structure, the statute's carveouts serve a different function: they establish a floor of persons who may not assist a voter, not a ceiling. *Nessel*, 628 F. Supp. 3d at 733 (Section 208's text and structure suggest that the employer and union carveouts "do not constitute an exhaustive or exclusionary list."). The last clause of Section 208 identifies two sets of persons who Congress saw as categorically improper for providing assistance due to concerns of "undue economic coercion." Hearings on the Voting Rights Act Before the Senate Subcommittee on the Constitution of the Committee on the Judiciary, 97th Cong., 2nd Sess. vol. II. 92 (statement of Senator East). That clause does not close the book on other state regulations that similarly protect voters from such risks.

Plaintiffs have acknowledged that Congress enacted Section 208 in part to "avoid possible intimidation or manipulation" of voters. ROA.29. And the voters that Congress sought to protect are even "more susceptible than the ordinary voter" to "hav[ing] their actual preference overborne by the influence of those assisting them or be[ing] misled into voting for someone other than the candidate of their choice." S. Rep. No. 97-417, at 62. Yet plaintiffs read Section 208 to mean that Congress categorically determined that the *only* potential sources of undue influence and manipulation are employers and union officials, and that

States *must* defer to a voter's choice of assistant in all other circumstances. That defies good sense.

Indeed, plaintiffs' view of Section 208 would lead to an absurd state of affairs. *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938) ("to construe statutes so as to avoid results glaringly absurd, has long been a judicial function"). According to plaintiffs, voters *must* be permitted to choose *any* person they want to provide them voting assistance (other than their employer or union officials), and *no* further limitations on that right are permissible. ROA.360 ("Section 208 guarantees that the voter can pick anyone except two options."); *see also* ROA.18-19, 34, 36, 50, 63-67. On plaintiffs' view the State is powerless to prohibit a voter from choosing as his assistant an incarcerated murderer, an institutionalized sexual predator, a serial election fraudster out on parole, a "random stranger" (ROA.360), or anyone else—regardless of a State's reasonable assessment of the risks of fraud, undue influence, manipulation, or other dangers to public welfare. That absurd state of affairs confirms that plaintiffs' view of Section 208 cannot be right. And it is no response to suggest that voters may be unlikely to choose some of those problematic persons as assistants. The view of Section 208 that the Court adopts in this case will need to apply across many circumstances—common and uncommon. Plaintiffs' view disables States from blocking

assistants who present a significant threat to the public interest and to voters. That view is irreconcilable with the statute that Congress enacted, which leaves States free to reasonably regulate voting assistance.

* * *

Section 208 entitles certain persons to voting assistance, while leaving leeway for States to reasonably regulate how and by whom that assistance is provided. The district court's ruling rests on a fundamental misunderstanding of the statute and reflects an approach to preemption that thwarts rather than advances Congress's aims. This Court should reject the district court's view of the statute.

B. S.B. 2358 Reasonably Regulates The Right To Voting Assistance.

S.B. 2358 is the type of reasonable regulation that Section 208 leaves States free to adopt. S.B. 2358 is a targeted regulation. It imposes minimal burdens and serves legitimate aims—including the very aims underlying Section 208. Far from serving as an unacceptable obstacle to federal law (*see* ROA.333-334), S.B. 2358 advances the "purposes and objectives of Congress" reflected in Section 208. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496 (1996) (quotations omitted).

Plaintiffs bear the burden of showing that S.B. 2358 presents a substantial threat of irreparable harm. *Willey v. Harris Cnty. Dist. Att'y*, 27 F.4th 1125, 1129 (5th Cir. 2022). They also bear the burden of showing that S.B. 2358 conflicts with federal law. *Greenwich Ins. Co. v. Mississippi Windstorm Underwriting Ass'n*, 808 F.3d 652, 655 (5th Cir. 2015). Here, that means demonstrating that S.B. 2358 exceeds the State's authority to adopt reasonable voting assistance regulations. Plaintiffs cannot meet this burden. The district court erred by ruling otherwise. ROA.333, 336-337.

S.B. 2358 imposes minimal burdens. It is a very targeted regulation. It applies only to the "collect[ion] and transmi[ssion]" of mail-in ballots. S.B. 2358 § 1(1). It preserves existing state laws allowing for voting assistance at all other stages—including assistance with completing absentee ballots. Miss. Code Ann. § 23-15-631(f) (absentee voters "shall be entitled to receive assistance in the marking of [their] absentee ballot and in completing the affidavit on the absentee ballot envelope"); *see also id.* § 23-15-549. It does not apply to the vast majority of election-assistance activities that plaintiffs describe in their complaint. For example, the law would not prohibit any person in Mississippi from assisting voters by, for example, "helping ... call the circuit clerk to request an absentee ballot application and ballot"; "visit[ing]" them "in

their home"; "help[ing] them fill out the ballot"; "mak[ing] sure that they sign" the ballot "in the right places"; "help[ing] them seal [and sign] the envelope"; and "mak[ing] sure that the envelope has the correct postage." ROA.77. Nor would the law prevent anyone from "go[ing] door-to-door to remind people to vote"; "encourag[ing] them to register"; or "educat[ing] people ... about the absentee ballot option." ROA.93. Indeed, plaintiffs themselves suggest that S.B. 2358 allows voters to "rely on 'anyone of [their] choice' to help them fill out [an absentee] ballot." ROA.56.

The *only* activity that falls within S.B. 2358's prohibition is collecting and transmitting a ballot. And even at that stage, S.B. 2358 exempts a broad range of persons—including family members, household members, and caregivers—who remain able to mail a ballot on the voter's behalf. And even if a voter does not have a family member, household member, or caregiver who is able to assist at this final stage, the voter can still arrange collection of a completed ballot by a postal worker, common carrier, or "[a]ny other individual who is allowed by federal law to collect and transmit United States mail." S.B. 2358 § 1(1)(c). S.B. 2358 imposes a remarkably minimal burden on voters.

And while it imposes only minimal burdens, S.B. 2358 promotes important state aims—including the aims underlying Section 208.

First, S.B. 2358 serves the "strong and entirely legitimate state interest" in "the prevention of fraud." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2340 (2021). It targets a specific practice (ballot harvesting) that presents heightened concerns of fraud. "[T]he potential and reality of fraud is much greater in the mail-in ballot context." *Veasey v. Abbott*, 830 F.3d 216, 239 (5th Cir. 2016) (en banc). And "[o]rganized absentee ballot fraud of sufficient scope to corrupt an election is no doomsday hypothetical." *Democratic Nat'l Comm. v. Hobbs*, 948 F.3d 989, 1071 (9th Cir. 2020) (en banc) (Bybee, J., dissenting), *rev'd and remanded sub nom. Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321 (2021). It happened in North Carolina in 2018, for example, where the results of a race for a seat in the House of Representatives were invalidated because of fraudulent mail-in ballots. *Brnovich*, 141 S. Ct. at 2348. Due to the inherent risks, the bipartisan Commission on Federal Election Reform recommended that States adopt laws to restrict the handling of absentee ballots. Comm'n on Fed. Election Reform, Building Confidence in U.S. Elections 46 (2005); *supra* pp. 11-12. Like Mississippi, other States restrict the collection of mail-in ballots. *E.g.*, Ga. Code Ann. § 21-2-385 (exclusions for a voter's listed family member, household member, or caregiver); Ind. Code Ann. § 3-14-2-16 (members of the voter's household or family, the voter's attorney, or postal workers); N.M. Stat. Ann. § 1-6-

10.1 (caregivers or members of the voter's immediate family or household); Ohio Rev. Code Ann. § 3509.05 (spouse or listed family member).

Second, S.B. 2358 enhances (rather than limits, as the district court presumed, ROA.333, 337) citizens' participation in democracy. Preventing fraud is essential. Fraud can "affect the outcome of a close election." *Brnovich*, 141 S. Ct. at 2340. It harms all voters by "dilut[ing] the right of citizens to cast ballots that carry appropriate weight." *Ibid.* As a result, it can "undermine public confidence in the fairness of elections and the perceived legitimacy of the announced outcome." *Ibid.* Thus, safeguarding election integrity "has independent significance, because it encourages citizen participation in the democratic process." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197 (2008) (plurality opinion). In enacting Section 208, Congress responded to concerns that voters who need assistance were "discourage[d] ... from voting for fear of intimidation or lack of privacy." S. Rep. No. 97-417, at 62 n.207. Congress left States to further Section 208's ends by adopting regulations that "encourage[ ] greater participation in [the] electoral process." *Id.* at 62-63. By advancing election integrity and protecting voters from fraud and manipulation, S.B. 2358 does that.

Last, S.B. 2358 serves the "compelling interest in protecting voters from confusion and undue influence." *Burson v. Freeman*, 504 U.S. 191, 199 (1992). S.B. 2358 minimizes those risks by restricting the categories of third parties who can handle ballots, while exempting groups (like family members and caregivers) that are less likely to take advantage of absentee voters. In this way, S.B. 2358 again advances a key aim of Section 208. That law reflects Congress's concern that blind, disabled, and illiterate voters are "more susceptible than the ordinary voter to having their vote unduly influenced or manipulated." S. Rep. No. 97-417, at 62. That concern is even more potent here because mail-in voters are even "more susceptible to pressure, overt and subtle, or to intimidation." Building Confidence 46; *see Brnovich*, 141 S. Ct. at 2348 ("[P]revention of fraud is not the only legitimate interest served by restrictions on ballot collection. ... [T]hird-party ballot collection can lead to pressure and intimidation.").

2. The district court did not acknowledge S.B. 2358's narrow application or the broad scope of voting assistance available under the statute. Instead, the court faulted S.B. 2358's "broad and vague nature" and lack of "guideposts" regarding the exception for family members, household members, and caregivers, which, in the court's view, "vest[ed] prosecuting authorities with broad discretion." ROA.336, 337. The court

also stressed that violations of S.B. 2358 "**shall**" result in "a criminal outcome" that is "not speculative or imaginary." ROA.336 (emphasis in original). These features, in the court's view, would "deter otherwise lawful assistors from providing necessary aid." ROA.333. The court's concerns are misplaced.

S.B. 2358 provides clear "guideposts" for its application. As noted, S.B. 2358 applies only to collecting and transmitting ballots. The statute specifically targets "ballot harvesting" (S.B. 2358 (title)), an activity that raises heightened concerns of fraud and manipulation. *E.g.*, Building Confidence 46-47. The statute includes a heightened intent requirement—it applies only to individuals who "*knowingly* collect and transmit a ballot that was mailed to another person." S.B. 2358 § 1(1) (emphasis added). That requirement "narrow[s] the scope of the [law's] prohibition and limit[s] prosecutorial discretion." *Gonzales v. Carhart*, 550 U.S. 124, 150 (2007). It also "mitigate[s]" concerns about purported "vagueness," "especially with respect to the adequacy of notice" to the public about what "conduct is proscribed." *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 499 (1982).

Furthermore, the fact that violations of S.B. 2358 "*shall* be subject to ... penalties" (S.B. 2358 § 1(1) (emphasis added)), is typical of criminal statutes of all types—it does not, as the district court believed, show that

prosecution of any plaintiff is more likely. *E.g.*, Miss. Code Ann. § 97-13-25 (persons guilty of false voter registration "*shall*, on conviction, be imprisoned ... or be fined ... or both"); *id.* § 97-15-1 (persons who willfully destroy a "traffic control device" "*shall*, on conviction thereof, be" "fined" or "imprisoned" or "both") (emphases added). S.B. 2358's use of the term "shall" does not mandate prosecution and so does not suggest a greater degree or likelihood of enforcement than any other criminal law. *Cf. Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005) (use of the word "shall" in a state regulation does not "mandate ... police action").

At the same time, S.B. 2358's broad exception for family members, household members, and caregivers reflects the Legislature's stated intention to "provide exceptions for certain instances where ballot collection does not constitute ballot harvesting." S.B. 2358 (title) (capitalization omitted). The exception uses common terms that can be interpreted "according to their ordinary and natural meaning." *NPR Invs., LLC ex rel. Roach v. United States*, 740 F.3d 998, 1007 (5th Cir. 2014) (quotations omitted). And the exception should be applied in view of "the overall policies and objectives of the statute," *ibid.* (quotations omitted), which, in this case, was drafted to carve out legitimate ballot-collection activities that do not present a significant risk of fraud. *See United States v. Levy*, 579 F.2d 1332, 1337 (5th Cir. 1978) ("[A] criminal

statute should be fairly construed in accordance with the legislative purpose behind its enactment."). To the extent there are concerns with particular applications of S.B. 2358's prohibition or exceptions, the proper method for challenging them is through an as-applied challenge—rather than through a broad facial attack on the statute like plaintiffs' challenge here. *Cf. Hersh v. United States ex rel. Mukasey*, 553 F.3d 743, 762 (5th Cir. 2008) ("Facial challenges to the constitutionality of statutes should be granted sparingly, and only as a last resort, so as-applied challenges are preferred.") (quotations omitted).

The district court did not address these important considerations. It focused only on the interest of voters in choosing assistants. That interest is important. But Section 208 reflects multiple concerns. And as explained, Section 208 does not (contrary to the district court's view) secure a boundless right to receive assistance from anyone of the voter's choice. *Supra* Part I-A. It secures a right to voting assistance while, at the same time, protecting vulnerable voters from "hav[ing] their actual preference overborne by the influence of those assisting them or be[ing] misled into voting for someone other than the candidate of their choice." S. Rep. No. 97-417, at 62. Section 208 leaves flexibility for States to address those concerns through reasonable regulations like S.B. 2358.

In sum, S.B. 2358 preserves voters' right to choose from a vast universe of assistants while advancing the public's strong interest in election integrity. It is a reasonable regulation. Section 208 therefore does not preempt it. The district court was wrong to rule otherwise. This Court should reject the preliminary injunction on this ground alone: plaintiffs cannot prevail on the merits of their sole claim.

II. Even Putting Preemption Aside, This Court Should Reject Or Dramatically Narrow The Preliminary Injunction.

Even if the district court were right on the merits, its injunction still cannot stand. The district court assumed that the potential harm to voters from enforcing S.B. 2358 outweighs the State's interests in enforcing the law. Based on this determination, the court granted broad relief against S.B. 2358 that extends beyond parties with standing and demonstrated irreparable injury. The court erred in both respects.

A. The Equities Strongly Weigh Against Injunctive Relief.

Plaintiffs seeking a preliminary injunction must show that their "threatened injury outweighs any harm" caused by the requested relief and that "the injunction will not disserve the public interest." *Willey v. Harris Cnty. Dist. Att'y*, 27 F.4th 1125, 1129 (5th Cir. 2022) (quotations omitted). As discussed above, S.B. 2358 imposes only minor, speculative harms on plaintiffs—only *one* of whom is a voter who even allegedly may

be affected by S.B. 2358. On the other hand, enjoining the law's enforcement will profoundly harm compelling state interests and undermine the public interest.

"A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam) (quotations omitted). S.B. 2358 furthers that compelling interest. *Supra* pp. 39-41. As a duly enacted law, S.B. 2358 represents the will of Mississippians and serves the public interest. The State has a strong interest in enforcing it. *Maine v. Taylor*, 477 U.S. 131, 137 (1986) ("[A] State clearly has a legitimate interest in the continued enforceability of its own statutes."). And the State is irreparably harmed by an injunction preventing that enforcement. *E.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) ("[T]he inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State.").

The district court said that it "appreciate[d]" that Mississippi has a "compelling interest" in election integrity. ROA.332. But the court did not meaningfully assess how enjoining S.B. 2358 would harm that interest. The court minimized the risk of fraud by stressing the lack of legislative "findings" and "data" showing that "Mississippi has a widespread ballot harvesting problem." ROA.337. Yet there have been numerous recent cases of absentee-ballot fraud in Mississippi. In a notable example, a local

party chairman and committee engaged in a sprawling voter-fraud scheme involving manipulation of absentee ballots and improper assistance to absentee voters. *United States v. Brown*, 561 F.3d 420 (5th Cir. 2009). There are many other examples. *E.g.*, *Sowers v. State*, 101 So. 3d 1156 (Miss. 2012) (conviction for ten counts of voter fraud involving numerous fraudulently signed absentee ballots and applications); *Tucker v. State*, 62 So. 3d 397 (Miss. Ct. App. 2010) (voter-fraud convictions from scheme to procure and influence absentee votes through payment); *Sewell v. State*, 721 So. 2d 129, 142 (Miss. 1998) (voter-fraud convictions from complex absentee vote scheme involving a candidate, notary public, and licensed attorney); *McFarland v. State*, 707 So. 2d 166 (Miss. 1997) (conviction for fraudulently signing an absentee ballot and several absentee ballot applications).

In any event, "[f]raud is a real risk that accompanies mail-in voting even if [a State has] had the good fortune to avoid it." *Brnovich*, 141 S. Ct. at 2348. And "it should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Ibid.*; *see Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986) ("Legislatures ... should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively."). The Legislature was not required to make specific findings

to adopt a reasonable regulation to address the risk of ballot harvesting. *Gonzales v. Raich*, 545 U.S. 1, 21 (2005) ("[T]he absence of particularized findings does not call into question [the] authority to legislate.").

The district court also failed to acknowledge that voters too have a strong interest "in the integrity of our electoral processes." *Purcell*, 549 U.S. at 4 (plurality opinion). "Confidence" in election integrity "is essential to the functioning of our participatory democracy," since "[v]oter fraud drives honest citizens out of the democratic process and breeds distrust of our government." *Ibid.* This applies to voters covered by Section 208 as well. Instead of considering these important concerns, the court focused exclusively on the speculative risk of harm represented by S.B. 2358's alleged chilling effects on "lawful assistors." ROA.333. But as discussed, the court did not adequately consider that S.B. 2358 is readily amenable to a reasonable interpretation and protects the interests of voters needing assistance by ensuring their ballots are not manipulated or unduly influenced by ballot harvesters with whom they do not have a close relationship. *See supra* pp. 41-45.

On top of these points is the fact that the district court granted broad relief against S.B. 2358's enforcement beyond the parties to this suit. *See infra* Part II-B. It granted that relief based on allegations of irreparable harm as to one individual-plaintiff voter (Mr. Whitley), whom

plaintiffs allege will be deprived of his preferred assistants (ROA.32-33), and based on speculative "examples" of how other voters, who are not plaintiffs here, might be "deter[red]" by S.B. 2358. ROA.337. The court's determination that such narrow or speculative allegations of harm override the State's and the public's sweeping interests in enforcing S.B. 2358 does not withstand scrutiny.

The court also failed to consider that many absentee voters would not have their choice in assistants affected by S.B. 2358 in any way—either because they do not need assistance with transmitting a ballot or because their preferred assistants fall within the statute's broad exceptions. Those voters will be deprived of S.B. 2358's benefits for election integrity while getting no benefits from the injunction.

The balance of harms and the public interest overwhelmingly favor rejecting injunctive relief against S.B. 2358's enforcement. The district court's contrary view is seriously mistaken. This provides an independent basis for rejecting the preliminary injunction in full.

B. Any Injunctive Relief Should Be Limited To Plaintiffs With Standing And Demonstrated Irreparable Injury.

Even if plaintiffs were entitled to injunctive relief against S.B. 2358's enforcement, the relief the district court ordered is vastly overbroad. The court entirely enjoined S.B. 2358's enforcement in 2023

elections, and thereafter broadly enjoined the law's enforcement in situations involving voters covered by Section 208. ROA. 338. It had no authority to do that. If this Court were to keep in place injunctive relief against S.B. 2358, it should remand with instructions that such relief be limited to individual plaintiffs who have demonstrated standing and irreparable injury from S.B. 2358's enforcement.

The Constitution and equitable principles dictate that injunctive relief must be "tailored to redress" a "particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018). Because "standing is not dispensed in gross" under Article III, "a plaintiff must demonstrate standing separately for each form of relief sought." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352-53 (2006) (quotations omitted). And equity requires that injunctive relief be no broader than "necessary to provide complete relief *to the plaintiffs*." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (emphasis added; quotations omitted). Relevant here, "[t]he purpose of a preliminary injunction is always to prevent irreparable injury." *Canal Auth. of State of Fla. v. Callaway*, 489 F.2d 567, 576 (5th Cir. 1974).

In this case, plaintiffs have claimed an injury "to the extent" that the enforcement of S.B. 2358 conflicts with Section 208, which, plaintiffs allege, "guarantees ... assistance from the person of [the voter's] choice." ROA.36, 57. Thus, under plaintiffs' theory, any relief should be limited to

voters who have demonstrated that S.B. 2358's enforcement would prevent them from receiving assistance from a specific person of their choice and to individuals who credibly fear imminent enforcement of S.B. 2358's prohibition against them for providing assistance to a voter covered by Section 208. At this stage in the proceedings, at most only the three individual plaintiffs have attempted to make such a showing. So, at most, injunctive relief could be proper for their benefit. *See DHS v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring) ("Equitable remedies, like remedies in general, are meant to redress the injuries sustained by a particular plaintiff in a particular lawsuit.").

Before the district court, plaintiffs conceded that, even if they were to succeed on their claim, defendants would be able to enforce S.B. 2358 "in cases involving voters who are not covered under Section 208." ROA.237. That is undoubtedly true. But plaintiffs still ask too much—and the district court granted too much. Many voters covered by Section 208 would not be injured in the slightest by S.B. 2358's enforcement. They might choose to vote in person. They might choose to transmit their own ballots. Or they may choose to receive assistance with transmitting their ballots from a person who falls within S.B. 2358's broad exceptions. Enjoining S.B. 2358's enforcement in situations involving such individuals would "exceed the legal basis of the lawsuit." *Scott v.*

Schedler, 826 F.3d 207, 214 (5th Cir. 2016); *see OCA-Greater Houston v. Texas*, 867 F.3d 604, 616 (5th Cir. 2017) (vacating injunction that prevented Texas from "enforcing any provision of its Election Code to the extent it is inconsistent with the VRA" because it was not "narrowly tailor[ed] ... to remedy the specific action which gives rise to the order") (quotations omitted).

Granting relief that extends beyond plaintiffs (that is, actual parties to the case) who have demonstrated a specific injury would violate the basic principle that valid Article III remedies "operate with respect to specific parties," not with respect to a law "in the abstract." *California v. Texas*, 141 S. Ct. 2104, 2115 (2021) (quotations omitted). And providing relief in all situations involving voters covered by Section 208 would effectively grant plaintiffs class-wide relief. But such relief is proper only when plaintiffs have satisfied the demanding requirements for class certification. *See* Fed. R. Civ. P. 23; *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979) ("[T]he Rule 23 class-action device" is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.").

In sum, if the Court were to rule that some injunctive relief is warranted, it should order that such relief be limited to individual plaintiffs with standing and a demonstrated injury. On this record, only

the three individual plaintiffs could possibly be entitled to such relief. If this Court does not reject the preliminary injunction outright, it should narrow the injunction to benefit only them.

CONCLUSION

This Court should vacate (or substantially narrow) the district court's order granting a preliminary injunction.

Respectfully submitted,

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November 15, 2023

CERTIFICATE OF SERVICE

I, Justin L. Matheny, hereby certify that the foregoing brief 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: November 15, 2023

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 11,511 words, excluding parts exempted by Fed. R. App. P. 32. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because its text has been prepared in proportionally spaced typeface, including serifs, using Microsoft Word 2016, in Century Schoolbook 14-point font.

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