

# NOTES

## “SOLO EN INGLÉS”: USING SECTION 208 OF THE VOTING RIGHTS ACT TO COMBAT MODERN LITERACY TESTS

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## INTRODUCTION

Since the 2020 presidential election, discourse on the laws governing United States elections has greatly increased and the debate between concerns over voter access and election integrity has entered the headlines.<sup>1</sup> Not only has public discourse seemingly increased, widespread changes to state election laws have also occurred in the aftermath of the 2020 elections.<sup>2</sup> One study suggests that in as many as twenty-six states, election laws have changed to make voting much harder post-2020.<sup>3</sup> Critics argue these changes have significantly reduced voting access and equity.<sup>4</sup> Another study found that, since January 2021, legislators in over forty states introduced bills aimed at limiting access to elections.<sup>5</sup> Many of these changes are in response to overwhelming, repeating, and increasing claims of foreign interference, voter fraud, and stolen elections.<sup>6</sup> At the federal level, the U.S. Supreme Court has continued to limit the reach of the Voting Rights Act (VRA) via multiple high-profile

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1. See Larry Garber & Avery Davis-Roberts, *Ensuring Election Integrity Should Not Come at The Cost of Compromising Voter Access*, FULCRUM (June 14, 2021), <https://thefulcrum.us/voting/carter-center> [<https://perma.cc/XW8S-5VL7>].

2. See Aaron Mendelson, *A Headlong Rush by States to Attack Voting Access—Or Expand It*, CTR. FOR PUB. INTEGRITY (Oct. 6, 2022), <https://publicintegrity.org/politics/elections/who-counts/a-headlong-rush-by-states-to-attack-voting-access-or-expand-it/> [<https://perma.cc/ZK7P-TSBV>].

3. See *id.*

4. See *id.*

5. See Brad Karp & Robert A. Atkins, *Georgia vs. New York on Voting Rights: No Contest*, 93 N.Y. ST. BAR ASS'N J. 22, 23 (2021) (explaining that “[t]here is an unprecedented outcry against the voter suppression laws spreading across the country, from Georgia to Texas to Florida to Arizona” and that “[s]ince January [of 2021], 361 bills have been introduced in more than 40 states, many with anti-voting provisions and many transparently aimed at disenfranchising Black and Brown voters”).

6. See *Voting Laws Roundup: May 2022*, BRENNAN CTR. FOR JUST. (May 26, 2022), <https://www.brennancenter.org/our-work/research-reports/voting-laws-roundup-may-2022> [<https://perma.cc/D78F-THY5>] (explaining that during 2021, lawmakers focused on passing election interference legislation and justified those efforts as “measures to combat baseless claims of widespread voter fraud and a stolen 2020 election”). One example of such a law that has gained significant attention is Georgia’s Election Integrity Act, sometimes referred to as Senate Bill 202. See S.B. 202, 156 Gen. Assemb., Reg. Sess. (Ga. 2021). Senate Bill 202 is nearly 100 pages long, and included among the numerous new restrictions on voter assistance is language that states “nor shall any person give, offer to give, or participate in the giving of any money or gifts, including, but not limited to, food and drink, to an elector” within 150 feet of a polling place or within 25 feet of a voter waiting in line at a polling place. *Id.* § 33.

decisions in recent years.<sup>7</sup> Though the Supreme Court issued an unexpected opinion earlier this year and did not further weaken the VRA in *Allen v. Milligan*, integral features of the VRA are still at risk of future attacks.<sup>8</sup>

Many of the post-2020 election law changes and challenges to the VRA are attacks that target methods of voting that are disproportionately used by individuals of minority communities, such as people of color and low-income individuals.<sup>9</sup> Challengers argue these limitations on equitable access to elections, particularly for minority voters, are a direct side effect of rhetoric that promotes fear over election integrity.<sup>10</sup> Election law in the U.S. is reaching a precipice where the typical tools for defending equitable voter access have been struck down or deeply weakened.<sup>11</sup> It has become imperative to explore underutilized and often overlooked portions of the VRA that are still in play, such as section 208 of the VRA.

Essentially, section 208 of the VRA protects the right to vote by allowing people with disabilities or an inability to read or write to have a person of their choice assist them in voting.<sup>12</sup> When a state limits that right, it often prevents large groups of minority individuals from voting.<sup>13</sup> Despite multiple precedents dealing with similar issues, the assertion that section 208 of the VRA does not

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7. See Gilda R. Daniels, *The State of Voting Rights*, 2 MD. BAR J. 122, 124 (2020) (elaborating on the downfall of the coverage formula found in section 4 of the VRA, which “immobilized section 5 of the VRA,” in the 2013 case *Shelby County v. Holder*); see also Nina Totenberg, *The Supreme Court Deals a New Blow to Voting Rights, Upholding Arizona Restrictions*, NPR (July 1, 2021, 4:37 PM), <https://www.npr.org/2021/07/01/998758022/the-supreme-court-upheld-upholds-arizona-measures-that-restrict-voting> [<https://perma.cc/WA2X-HVV3>] (detailing the impact of the Supreme Court’s decision in *Brnovich v. Democratic National Committee* on section 2 of the VRA).

8. No. 21-1086, Slip Op. at 2 (2023); see Amy Howe, *Conservative Justices Seem Poised to Uphold Alabama’s Redistricting Plan in Voting Rights Act Challenge*, SCOTUSBLOG (Oct. 4, 2022, 5:19 PM), <https://www.scotusblog.com/2022/10/conservative-justices-seem-poised-to-uphold-alabamas-redistricting-plan-in-voting-rights-act-challenge/> [<https://perma.cc/63LL-BLU8>].

9. See Mendelson, *supra* note 2 (outlining how certain race-neutral measures can have disproportionate impacts).

10. See *id.*

11. See *id.*

12. See 52 U.S.C. § 10508. This Note focuses on the portion of section 208 that deals with individuals that suffer from an inability to read or write.

13. See Complaint at 21, *Mo. Prot. & Advoc. Servs. v. Ashcroft*, No. 2:22-CV-04097 (W.D. Mo. June 22, 2022).

cover voters with limited English proficiency still permeates various scholarship, as the plain language of the statute uses the phrase “inability to read or write,” which could be construed as only protecting illiterate individuals.<sup>14</sup>

This Note asserts that section 208 of the VRA plays a vital role in protecting equitable access for limited English proficient (LEP) voters to cast their ballot. It does so by (1) providing background on protections in the VRA for LEP voters, (2) proposing that section 208 fills the gap left by other provisions of the VRA, and (3) offering recommendations for using section 208 effectively. These recommendations will include (1) amending section 208, (2) furthering education, and (3) increasing individual state actions. Lastly, this Note will argue that section 208 should serve as a model for Congress in striking a balance to protect specific interests while being narrowly tailored enough to withstand frequent challenges.

## I. BACKGROUND

### A. *History of the VRA and LEP Voters*

Congress designed the VRA for the purpose of “correct[ing] an active history of discrimination ... and deal[ing] with the accumulation of discrimination.”<sup>15</sup> The Supreme Court has long held that in situations where the right to vote is being considered, any classification “must be closely scrutinized and carefully confined.... [because] the right to vote is too precious, too fundamental to be so burdened or conditioned.”<sup>16</sup> Since being enacted, the VRA has significantly improved the ability of minority populations to exercise their right to vote.<sup>17</sup> Congress has amended the VRA as necessary in order to expand voting rights to groups that still face barriers to voting.<sup>18</sup>

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14. See 52 U.S.C. § 10508; Terin M. Barbas, Note, *We Count Too! Ending the Disenfranchisement of Limited English Proficiency Voters*, 37 FLA. ST. U. L. REV. 189, 196 (2009).

15. 111 CONG. REC. 8295 (1965).

16. *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966).

17. *Making Voting Accessible with Section 208 of the VRA*, DEMOCRACY DOCKET (Aug. 8, 2022), <https://www.democracydocket.com/analysis/making-voting-accessible-with-section-208-of-the-vra/> [<https://perma.cc/BE8L-G83T>].

18. See *id.*

Literacy tests were formally banned with the passage of the VRA in 1972.<sup>19</sup> In 1975, Congress added section 203 to require accommodations in certain geographic regions that met threshold requirements outlined in the Section.<sup>20</sup> During the process of enacting section 203, opponents of language assistance argued that Congress lacked the authority to institute such requirements.<sup>21</sup> However, it was ultimately found that “failing to provide language assistance to illiterate, non-English speaking voters amounted to an English literacy test” and resulted in disenfranchising effects.<sup>22</sup>

For a jurisdiction to fall under section 203 requirements, two thresholds must be met.<sup>23</sup> First, more than 10,000 citizens of voting age—or greater than 5 percent of all voting-age citizens in the jurisdiction—must be LEP.<sup>24</sup> Second, the illiteracy rate of the language minority overall must be higher than the national illiteracy rate.<sup>25</sup> In addition to these threshold requirements, section 203 also explicitly states that “the term ‘language minorities’ or ‘language minority group’ means persons who are American Indian, Asian American, Alaskan Natives, or of Spanish heritage.”<sup>26</sup> As a result, groups of LEP voters who either do not live in geographically-compact areas or are not part of the specifically-named communities listed in section 203 may still be unable to meaningfully exercise their right to vote without assistance during the voting process.<sup>27</sup>

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19. 52 U.S.C. § 10301.

20. *Id.* § 10503(c) (stating that when a state, which meets the threshold required by section 203, “provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language”).

21. See James Thomas Tucker, *The Battle over “Bilingual Ballots” Shifts to the Courts: A Post-Boerne Assessment of Section 203 of the Voting Rights Act*, 45 HARV. J. LEGIS. 507, 515 (2008).

22. *Id.* (noting that “[t]he disenfranchising effects of not providing language assistance were particularly severe where voters could not get assistance from persons of their choice”).

23. 52 U.S.C. § 10503(b)(2).

24. *Id.* § 10503(b)(2)(A)(i)(I)-(II). Only the 5 percent of the voting-age citizen population criteria can trigger state-wide coverage. See *id.*

25. *Id.* § 10503(b)(2)(A)(i)(III)(ii).

26. *Id.* § 10503(e).

27. See *id.*

The addition of section 208 in the 1982 amendment of the VRA was arguably, in part, intended to provide the framework to implement an already-established right within the VRA.<sup>28</sup> Thus, section 208 applies nationally and reads, “[a]ny 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.”<sup>29</sup> Today, some level of confusion still exists regarding whether section 208 was intended to cover LEP individuals.<sup>30</sup> One interpretation of the statutory language is that section 208 gives only completely illiterate individuals the right to request assistance during the voting process.<sup>31</sup> Even among those who find that section 208 does apply to LEP individuals, voter assistance may still be limited by failure of election workers to abide by proper procedure when interacting with voters eligible for section 208 protections.<sup>32</sup>

### *B. Affected Populations*

Despite a seemingly unofficial default to English, the U.S. does not have an official national language.<sup>33</sup> Between 350 and 430 languages are spoken throughout the U.S. today, and the latest American Community Survey estimates that 21.5 percent of people speak a language other than English at home.<sup>34</sup> In addition, the same survey found over 8 percent of the population speaks English

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28. See S. REP. NO. 97-417, at 62 (1992) (explaining that members of certain minority communities have the right to vote but are unable to effectively utilize it without a provision such as section 208 that will “make fully ‘meaningful’ the vote of the blind, disabled, or those who are unable to read or write”).

29. 52 U.S.C. § 10508.

30. See Barbas, *supra* note 14, at 197-200.

31. See *id.* at 196.

32. See *id.* at 197-200 (noting examples of when election officials failed to act according to procedure which resulted in the suppression of minority voters).

33. See *Official Language of the United States*, USA.GOV, <https://www.usa.gov/life-in-the-us#item-36017> [<https://perma.cc/K3R8-SNRU>].

34. See *Language Data for the United States of America*, TRANSLATORS WITHOUT BORDERS, <https://translatorswithoutborders.org/language-data-for-the-united-states-of-america#:~:text=There%20are%20between%20350%20and,other%20indigenous%20languages%20as%20official> [<https://perma.cc/T8V3-AQ9K>]; see also *American Community Survey: Languages Spoken at Home*, U.S. CENSUS BUREAU (2020), <https://data.census.gov/cedsci/table?tid=ACSDP5Y2020.DP02> [<https://perma.cc/AV72-4N7J>].

less than “very well.”<sup>35</sup> To put that into perspective, in 2020, there were 66,093,076 people five years old or older who spoke a language other than English at home and 25,312,204 individuals who spoke English less than “very well.”<sup>36</sup> While these statistics are gathered from five-year estimate surveys and are not specifically targeted to capture only eligible voting-age citizens, it is estimated that in 2021 there were 39,148,835 citizens eighteen years or older in the U.S. who spoke a language other than English.<sup>37</sup> Such populations continue to grow annually.<sup>38</sup> Additionally, these minority groups are numerous enough to impact elections in battleground areas.<sup>39</sup>

In order to fully grasp how vital the protections of section 208 are to LEP individuals, it is important to note that many of the individuals included in the statistics above do not live in regions covered by section 203.<sup>40</sup> The ongoing litigation in Missouri exemplifies this.<sup>41</sup> The Latino population in the St. Louis region has grown by nearly 50 percent since 2010, despite the area’s total population staying relatively stagnant.<sup>42</sup> Missouri does not meet the section 203 threshold, so there are no federally-mandated accommodations that require election materials to be offered in other languages.<sup>43</sup> Another example is Hall County, Georgia, where nearly 30 percent

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35. *American Community Survey: Selected Social Characteristics in the United States*, U.S. CENSUS BUREAU (2020), <https://data.census.gov/cedsci/table?q=selected%20social&tid=ACSDP1Y2021.DP02> [<https://perma.cc/AV72-4N7J>].

36. *Id.*

37. *American Community Survey: Languages Spoken at Home*, U.S. CENSUS BUREAU (2021), <https://data.census.gov/cedsci/table?q=languages%20spoken%20at%20home> [<https://perma.cc/AV72-4N7J>].

38. *American Community Survey: Languages Spoken at Home*, U.S. CENSUS BUREAU (2016), <https://data.census.gov/table?q=languages+spoken+at+home> [<https://perma.cc/AV72-4N7J>] (estimating that just a few years prior in 2016, the number of citizens eighteen years or older who spoke a language other than English in the U.S. was 35,089,101).

39. See Emily Previti, *Millions of U.S. Voters Risk Missing the Historic 2020 Election Because Their English Isn’t Good Enough*, WHYY (Oct. 31, 2020), <https://whyy.org/articles/millions-of-u-s-voters-risk-missing-the-historic-2020-election-because-their-english-isnt-good-enough/> [<https://perma.cc/3Z9N-KBLH>].

40. *See id.*

41. Complaint, Mo. Prot. & Advoc. Servs. v. Ashcroft, 2:22-cv-04097 (W.D. Mo. June 22, 2022).

42. Eric Schmid & Brian Munoz, *The St. Louis Region Is Already Home for Many Latinos and More Are Moving Here*, ST. LOUIS PUB. RADIO (Nov. 16, 2021, 6:00 AM), <https://news.stpublicradio.org/culture-history/2021-11-16/the-st-louis-region-is-already-home-for-many-latinos-and-more-are-moving-here> [<https://perma.cc/89F9-6SA6>].

43. *See* 86 Fed. Reg. 233 (Dec. 8, 2021).

of the population is Latino, but federal law does not require non-English ballots because the section 203 requirements are not met.<sup>44</sup> Unless a proactive state or local election law requires the provision of election materials in other languages and translation equipment, large groups of minority individuals still face suppressive impediments to voting due to a language barrier that amounts to a literacy test.<sup>45</sup>

### *C. Voter Assistance Laws: Burdening Minority Communities*

Voter assistance laws limiting who can be chosen to assist voters or the number of individuals one person can assist per election directly infringe on the ability of LEP populations to have the person of their choice assist them during the voting process. Litigation, both past and ongoing, has continually challenged voter assistance restriction laws.<sup>46</sup> To better understand the issues at hand, a brief overview of some of the litigation surrounding section 208 follows.

In *OCA-Greater Houston v. Texas*, plaintiffs challenged a state law that required anyone assisting a voter to also be a registered voter in the same county.<sup>47</sup> The court ultimately held that the law “impermissibly narrow[ed] the right guaranteed by section 208 of the VRA.”<sup>48</sup> In addition, the court went on to describe that voting is not just the physical or “mechanical act of filling out the ballot sheet,” but that voting also encompasses the steps before, after, and

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44. Matt Vasilogambros, *Immigrant Communities Push for More Non-English Ballots*, PEW STATELINE (May 10, 2022, 12:00 AM), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2022/05/10/immigrant-communities-push-for-more-non-english-ballots> [<https://perma.cc/3KAS-JZXF>].

45. See, e.g., Zach Despart, *Harris County Unveils Multilingual Virtual Translators for Polling Sites*, HOUS. CHRON. (Feb. 14, 2020), <https://www.houstonchronicle.com/news/houston-texas/houston/article/Harris-County-unveils-multilingual-virtual-15057921.php> [<https://perma.cc/BRG5-FXFM>] (using new technology that allows voters to communicate with interpreters in over thirty languages, including, but not limited to the four languages required by law).

46. See *Arkansas United v. Thurston*, No. 5:20-CV-5193, 2022 WL 4097988, at \*1 (W.D. Ark. Sept. 7, 2022); *Democracy N.C. v. N.C. State Bd. of Elections*, 590 F. Supp.3d 850, 856 (M.D.N.C. 2022); *La Union del Pueblo Entero v. Abbott*, 614 F. Supp. 3d 509, 513 (W.D. Tex. 2022); *Complaint at 24-25, Mo. Prot. & Advoc. Servs. v. Ashcroft*, No. 2:22-cv-04097 (W.D. Mo. June 6, 2022).

47. 867 F.3d 604, 607-08 (5th Cir. 2017).

48. *Id.* at 615.

during the ballot-casting process.<sup>49</sup> This case has continued to be important precedent in more recent section 208 litigation.<sup>50</sup>

Other courts have found section 208 to be narrower. For instance, a federal district court in *Ray v. Texas* held that “[t]he language of [s]ection 208 allows the voter to choose a person who will assist the voter, but it does not grant the voter the right to make that choice without limitation.”<sup>51</sup> While the majority of cases that have come after *Ray* tend to give less latitude toward the state and more discretion to the voter, no court has ever expressly overturned *Ray*.

Currently, litigation is underway in both Arkansas and Missouri that addresses the protection of the rights established by section 208 of the VRA.<sup>52</sup> After first discussing section 208 as a gap-filler provision, this Note will then explore the boundaries of both cases.

## II. SECTION 208: AN EFFECTIVE GAP-FILLER PROVISION

Section 208 is an often-overlooked component of the VRA that can be used as a gap-filling provision for geographical regions where section 203 fails to provide relief. Section 208 has continually survived litigation challenges in order to remain a viable protection for LEP voters and could be used more frequently as a tool to achieve important protections for minority voters. However, it is not without limitations, including challenges associated with burdening LEP voters with finding their own assistant for the voting process.

### *A. Where Section 203 Fails, Section 208 Fills the Gap*

A 2022 case in the United States Court of Appeals for the Eleventh Circuit, *Georgia Association of Latino Elected Officials, Inc. v. Gwinnett County Board of Registration and Elections*, demonstrates

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49. *Id.* The court had to revisit this same matter in Texas just a few years later to expand the 2018 permanent injunction to certain provisions of S.B.1 as it contained portions of the same language that caused voter suppression of LEP individuals. See *OCA Greater Houston v. Texas*, No. 1:15-CV-679-RP, 2022 WL 2019295, at \*1-3 (W.D. Tex. June 6, 2022).

50. See, e.g., *Arkansas United*, 2022 WL 4097988, at \*7.

51. *Ray v. Texas*, No. CIV.A.2-06-CV-385, 2008 WL 3457021, at \*7 (E.D. Tex. Aug. 7, 2008).

52. See *Arkansas United*, 2022 WL 4097988; *Mo. Prot. & Advoc. Servs. v. Ashcroft*, No. 2:22-cv-04097 (W.D. Mo. June 6, 2022).

section 208's ability to fill the gap left by other provisions of the VRA that were intended to assist language minorities to effectively cast a ballot.<sup>53</sup> Gwinnett County, Georgia, is subject to the provisions of section 203 of the VRA.<sup>54</sup> However, the State of Georgia as a whole is not covered by section 203.<sup>55</sup> The COVID-19 pandemic delayed Georgia's 2020 presidential primary election from March until June.<sup>56</sup> Due to the uncertainty of the pandemic, Georgia Secretary of State Brad Raffensperger issued a press release encouraging voters in Georgia to vote by absentee ballot, rather than in person on election day.<sup>57</sup> Normally, county election officials in Georgia would handle absentee ballot applications.<sup>58</sup> But due to pandemic-related changes in procedure, the state mailed two rounds of absentee ballot applications to active Georgia voters; these were all only in English.<sup>59</sup> The plaintiffs in this case took issue with the fact that not only were all the ballot applications provided only in English, but so were all election materials that the Georgia Secretary of State provided to the voters of Gwinnett County.<sup>60</sup>

As a result of these resources being only in English, the plaintiff, and possibly many other LEP voters, "mistook the Secretary's absentee ballot applications for 'junk mail' and could not complete them."<sup>61</sup> The plaintiffs alleged this critical information should have been available in Spanish since Gwinnett County is covered under section 203.<sup>62</sup> Ultimately, the Court of Appeals agreed with the

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53. See 36 F.4th 1100 (11th Cir. 2022).

54. *Id.* at 1109 (noting that neither party disputes the fact that Gwinnett County is covered by section 203 and that the result is "whenever Gwinnett County provides the materials or information described in § 203, they must be in both English and Spanish").

55. *Id.*

56. *Id.* (delaying first from March 2020 to May 2020 and then continuing the delay until June 9, 2020, due to the shelter-in place order at the time).

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.* at 1109-10 (listing that two rounds of absentee ballot applications, all press releases, an official website, and precinct cards containing information regarding polling place, voting districts, and change of address processes were only provided in English to voters throughout Georgia, including in Gwinnett County).

61. *Id.* at 1110.

62. *Id.* at 1110-11. Plaintiffs also present a similar claim regarding section 4(e) of the VRA, but that is not as directly relevant to the premise of this paper as it deals with a much more limited population of individuals. *Id.* at 1111. Additionally, plaintiffs concede that

District Court in holding that materials provided by the state, rather than directly from Gwinnett County officials, were not required to comply with section 203 provisions.<sup>63</sup>

This scenario, and others like it, is one reason section 208 is still so pertinent. Voters in Gwinnett County are identified as needing protection in the form of language assistance, but because Georgia as a whole does not meet the thresholds for section 203 protections, those same voters fail to receive assistance regarding state provided materials.<sup>64</sup> Section 208 fills the gap in areas where populations of individuals need language assistance but are not numerous or compact enough to trigger the thresholds of section 203.

In practice, where section 203 fails to extend to materials provided by the state as a whole, section 208 allows for an LEP voter to have the person of their choice assist them in making sure their ballot is meaningfully cast.<sup>65</sup> For the Gwinnett voters, even though section 203 does not provide relief, section 208 allows them to get assistance from a person of their choice to help interpret election materials and ensure that when casting their ballot they are doing so with language assistance.<sup>66</sup> This right extends not just to the voting booth, but to all stages of the voting process.<sup>67</sup>

### *B. Combating Minority Vote Suppression*

While it is true that formal literacy tests are no longer part of the election system in the U.S., it is also true that multiple laws are still intact today that have the same effect on large groups of minority voters.<sup>68</sup> One example is section 7-5-310(b)(4)(B) of the Arkansas

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portions of the website could be generated in Spanish if users navigate the website and click specific buttons (a task that they claim would be nearly impossible for an LEP individual), but that auto-generated translation is also full of errors. *Id.* at 1110.

63. *Id.* at 1121-23 (finding that when reading the statutory text of section 203, parts (b) and (c) must be read together and apply to the same entities. Thus, only the political subdivision which meets the criteria presented in section 203(b) must comply with the provisions in section 203(c), rather than the larger unit that includes the subdivision).

64. *See id.*

65. *See* 52 U.S.C. § 10508.

66. *See* OCA-Greater Houston v. Texas, 867 F.3d 604, 615 (5th Cir. 2017).

67. *See id.*

68. *See, e.g.*, ARK. CODE ANN. § 7-5-310(b)(4)(B) (West 2020); MO. REV. STAT. § 115.445.3 (1977).

Code, which limits the number of voters an individual can assist per election to six.<sup>69</sup> A second example is section 115.445.3 of the Missouri Revised Statutes, an election law that has been in existence since 1977 in Missouri.<sup>70</sup> This law, commonly referred to as Missouri's Single-Voter Assistance Restriction, limits the number of voters one individual can assist during each election.<sup>71</sup> While neither the Arkansas nor Missouri law facially includes any restrictions resembling a literacy test, there is a clear disparate impact of the law on LEP individuals who require assistance to vote.

Arkansas and Missouri do not currently trigger the thresholds set forth in section 203 to require minority language assistance, but there are still growing populations of individuals who need assistance. Voter assistance restriction laws directly inhibit those individuals from being able to fully and effectively exercise their right to vote. Not only is this an issue of voter suppression that mirrors the era of literacy tests, the restrictions also burden the individuals who are playing an integral role in society by helping LEP individuals vote.<sup>72</sup> Along with the statutes that the plaintiffs in the Arkansas and Missouri cases challenge for violating section 208, there are also sections of the Arkansas and Missouri codes that criminalize assisting more than the currently-allowed number of voters.<sup>73</sup> Thus, volunteers for nonprofits and individuals in the community helping to ensure minority voters are able to exercise their right to vote must choose between facing criminal prosecution or denying assistance to those in need.<sup>74</sup> There are not enough individuals able to assist to operate within the current limitations.<sup>75</sup> The courts in both cases should find that the state laws impermissibly narrow section 208 of the VRA and violate the Supremacy Clause of the U.S. Constitution.

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69. ARK. CODE ANN. § 7-5-310(b)(4)(B) (West 2020).

70. MO. REV. STAT. § 115.445.3 (1977).

71. *Id.*

72. *See* MO. REV. STAT. §§ 115.291.1, 115.635.8; ARK. CODE ANN. §§ 7-1-103(a)(19), (b)(1).

73. *See* MO. REV. STAT. §§ 115.291.1, 115.635.8; ARK. CODE ANN. §§ 7-1-103(a)(19), (b)(1).

74. *See* MO. REV. STAT. §§ 115.291.1, 115.635.8; ARK. CODE ANN. §§ 7-1-103(a)(19), (b)(1).

75. Complaint at 21, *Mo. Prot. & Advoc. Servs. v. Ashcroft*, No. 2:22-cv-04097 (W.D. Mo. June 6, 2022).

### 1. *Arkansas Case Study*

One 2022 case dealing with limitations on section 208 is *Arkansas United v. Thurston*.<sup>76</sup> The challenged law in this case restricted individuals from assisting more than six voters per election.<sup>77</sup> The plaintiffs filed the complaint just a day and a half prior to the November 2020 General Election and requested a preliminary injunction, which would prevent the rule in question from being in effect during the election.<sup>78</sup> The court denied the preliminary injunction due to what is commonly referred to as the *Purcell* principle.<sup>79</sup> Essentially, this means that the court was worried about the logistical concerns involved in changing election laws and procedures so close to an election.<sup>80</sup> One of the central claims of the plaintiffs in this case is that Arkansas Code § 7-5-310(b)(4)(B), the section of the code that restricts the number of voters one individual can assist per election to six, impermissibly narrows the rights outlined in section 208 of the VRA.<sup>81</sup> The plaintiffs asserted that this state law was preempted by section 208 of the VRA and was thus a violation of the Supremacy Clause.<sup>82</sup> In August of 2022, the district court issued a ruling in this case and then amended it in September of 2022 in response to a request for clarification.<sup>83</sup>

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76. No. 5:20-CV-5193, 2022 WL 4097988, at \*2 (W.D. Ark. Sept. 7, 2022).

77. ARK. CODE ANN. § 7-5-310(b)(4)(B) (2020) (“No person other than the following shall assist more than six (6) voters in marking and casting a ballot at an election: (i) A poll worker; (ii) The county clerk during early voting; or (iii) A deputy county clerk during early voting.”).

78. *Arkansas Voter Assistance Limitations Challenge: Arkansas United v. Thurston*, DEMOCRACY DOCKET (last updated Mar. 24, 2023, 3:20 PM) <https://www.democracydocket.com/cases/arkansas-voter-assistance-limitations-challenge/> [<https://perma.cc/7RVN-8BTQ>] (outlining a summary of the claims of each party, documenting the filing dates of each document in *Arkansas United v. Thurston*, and tracking the current status of the case as it moves from the District Court to the Eighth Circuit).

79. *Arkansas United v. Thurston*, 5:20-CV-5193, 2020 WL 6472651, at \*5 (W.D. Ark. Nov. 3, 2020).

80. See *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam) (holding that states should ordinarily avoid changing election procedures too close to an election, which could result in confusion among poll workers and voters).

81. Complaint at 2-3, *Arkansas United v. Thurston*, No. 5:20-cv-05193 (W.D. Ark. Nov. 2, 2020).

82. *Id.*; U.S. CONST. art. VI, ¶ 2 (prohibiting state interference in federal law by establishing federal supremacy).

83. *Arkansas United v. Thurston*, 5:20-CV-5193, 2022 WL 3584626, at \*2 (W.D. Ark. Aug. 19, 2022), amended by *Arkansas United v. Thurston*, No. 5:20-CV-5193, 2022 WL 4097988 (W.D. Ark. Sept. 7, 2022).

Importantly for the viability of section 208, the court found that the plain language of section 208 encompasses LEP voters and preempts the Arkansas election law that limits each person to only assisting six voters per election.<sup>84</sup> The defendants in this case have since filed a notice of appeal and the Eighth Circuit issued a stay of the lower court's order pending appeal.<sup>85</sup> In March of 2023, the Eighth Circuit issued an order holding the Arkansas voter assistance case in abeyance pending a decision in an Arkansas redistricting case.<sup>86</sup> While the two Arkansas cases raise mostly unrelated claims, the redistricting case deals with the question of whether there is a private right of action under the VRA, which would greatly impact the outcome of the voter assistance challenge as well.<sup>87</sup>

## 2. *Missouri Case Study*

An example of a voter who has been directly affected by Missouri's Single-Voter Assistance Restriction is Susana Elizarraraz's mom, who is deaf and LEP.<sup>88</sup> She requires Elizarraraz's assistance in order to exercise her right to vote in each election.<sup>89</sup> During an April 2022 election, Elizarraraz was out of town for work.<sup>90</sup> Elizarraraz's mother was unable to vote in that election because there were no volunteers left who had not already assisted another

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84. *Id.*

85. Notice of Appeal, *Arkansas United v. Thurston*, No. 5:20-CV-5193 (W.D. Ark. Sept. 8, 2022); Order Stay, Pending Appeal, No. 22-2918 (8th Cir. Sept. 28, 2022). Here, the appeals court also heavily relied on the *Purcell* principle as to the reason for its decision making. *Id.* However, rather than being on the eve of an election such as when the case was filed, the lower court's decision was over a month from the 2022 midterm elections. *Arkansas United*, 2022 WL 4097988 (Sept. 7, 2022). Perhaps the *Purcell* principle is being given much wider application than originally intended, but that is beyond the scope of this Note.

86. Order Holding Case in Abeyance, *Arkansas United v. Thurston*, No. 22-2918 (8th Cir. Mar. 6, 2023).

87. *See* Ark. State Conference NAACP v. Ark. Board of Apportionment, No. 22-1395 (8th Cir. filed Feb. 24, 2022). Importantly, though the Supreme Court's ruling in *Allen v. Milligan* did not directly address the question of whether there is a private right of action under section 2 of the VRA, it does offer guidance on the question. *See generally* 599 U.S. 1 (2023). *Allen* was brought by private litigants and the fact that the Supreme Court decided it seems to reaffirm the existence of a private right of action. *See id.*

88. *See* Complaint at 21, *Mo. Prot. & Advoc. Servs. v. Ashcroft*, No. 2:22-cv-04097 (W.D. Mo. June 6, 2022).

89. *See id.*

90. *See id.*

voter and Missouri’s Single-Voter Assistance Restriction limited those volunteers from assisting any other voters.<sup>91</sup> Thus, as a direct result of Missouri’s voter assistance restriction, Susana Elizarraraz’s mom could not vote.<sup>92</sup> While the one-sentence election law drafted decades ago in Missouri might seem like a small procedural matter, it may actually be preventing a significant number of voters from accessing the ballot box.

Elizarraraz is part of a case currently challenging Missouri’s Single-Voter Assistance Restriction on the basis that it is preempted by section 208 of the VRA and violates the Supremacy Clause of the U.S. Constitution.<sup>93</sup> The central claims are nearly identical to those found in the Arkansas case.<sup>94</sup> Many of the compelling facts from the Missouri case are mentioned above regarding the massive change in population demographics in certain areas of Missouri.<sup>95</sup> Because *Arkansas United* is in the same circuit, the Missouri court ordered both parties to brief whether this matter should be stayed pending the resolution of *Arkansas United* on appeal.<sup>96</sup> The court ultimately ordered the stay.<sup>97</sup> For each election that the voter assistance restriction laws remain in effect, LEP individuals are effectively being denied voting access due to what amounts to modern-day English literacy tests.

### C. Possible Pitfalls of Section 208

While section 208 continues to withstand litigation challenges and offers crucial protection to voters who may otherwise not have any access to assistance, it is not without flaws. Section 208 has been deemed an “incomplete remedy for minority-language voters

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91. *See id.*

92. *See id.*

93. *See id.* at 24-25.

94. Compare Complaint at 14-15, *Arkansas United v. Thurston*, No. 5:20-cv-05193 with Complaint at 24-25, Mo. Prot. & Advoc. Servs., No. 2:22-cv-04097.

95. *See Schmid & Munoz, supra* note 42 and accompanying text.

96. Order Directing Parties to Brief Whether Case Should be Stayed, Mo. Prot. & Advoc. Servs., No. 2:22-cv-04097.

97. Order Staying Case, Mo. Prot. & Advoc. Servs., No. 2:22-cv-04097-RK (W.D. Mo. Oct. 25, 2022). Additionally, just as in *Arkansas United*, the ability of this case to move forward is heavily tied to the outcome of the Arkansas redistricting case currently before the 8th Circuit. *See supra* notes 86-87 and accompanying text.

in need of interpretation services.”<sup>98</sup> Scholars note that one shortcoming of the provision is that the burden to find assistance falls on the voter, rather than the government.<sup>99</sup> Due to this limitation, bilingual ballots and election materials, along with other provisions of the VRA such as sections 203 and 4(f)(4), have been referred to as more comprehensive and helpful to LEP voters.<sup>100</sup>

Another possible pitfall of section 208 is that in order to translate and interpret ballots and other election materials, more skills are needed than just being able to speak multiple languages.<sup>101</sup> There are no assurances when you choose your own assistant that they are competent.<sup>102</sup> Thus, even if the voter who needs assistance is able to find someone who speaks their language, that does not guarantee an effective translation or interpretation.<sup>103</sup>

Each of these concerns are valid critiques of section 208, but focusing on its limitations fails to show the entire narrative surrounding the provision. LEP voters and those advocating for and defending minority access to elections are being “forced to rely on [s]ection 208” due to a lack of other effective remedies.<sup>104</sup> LEP voters and their advocates are having to use section 208 to gain broader protections than it may have originally been designed to give.<sup>105</sup> The ability to bring a person of one’s own choosing was meant to ensure the right to a secret ballot and to prevent undue influence of voters who are vulnerable to manipulation by those unknown to them.<sup>106</sup> Section 208 has become—through necessity—a gap-filler provision to protect LEP voter access to elections. When section 203 fails either by geography or because of the short list of covered languages, section 208 provides a bedrock that at the very least allows a voter in need to bring someone of their choice to help

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98. JoNel Newman, *Ensuring that Florida’s Language Minorities Have Access to the Ballot*, 36 STETSON L. REV. 329, 354 (2007).

99. See Abigail Hylton, Note, *Ballots in an Unfamiliar Language and Other Things That Make No Sense: Interpreting How the Voting Rights Act Undermines Constitutional Rights for Voters with Limited English Proficiency*, 30 WM. & MARY BILL RTS. J. 505, 516, 526 (2021).

100. Newman, *supra* note 98, at 354.

101. See Hylton, *supra* note 99, at 516-17.

102. See *id.*

103. See *id.*

104. Newman, *supra* note 98, at 355.

105. See S. Rep. No. 97-417, *supra* note 28, at 62-63.

106. See *id.* at 62.

ensure their right to vote is protected and that their vote is still meaningful.<sup>107</sup> Government-provided translators and interpreters in every jurisdiction would certainly reduce a burden on voters currently forced to search for their own, but that fix would not be consistent with the clear legislative intent to preserve the secret ballot.<sup>108</sup> It also seems unlikely in this political climate with such expansive fears over election integrity that access would be opened up in such a manner via any new or clarifying legislation.<sup>109</sup> Such a program would also come with a huge financial cost.<sup>110</sup>

Despite the pitfalls, section 208 is doing an effective job at expanding its role to provide a bare minimum level of access that otherwise is not offered in the U.S. In addition, if section 208 had been more expansive to begin with, it might have fallen with the many other VRA provisions that have been effectively struck or deeply weakened in the last decade.

### III. RECOMMENDATIONS

While section 208 still provides effective assistance to LEP voters, it is important to look at ways in which the provision could be strengthened to provide increased protection or to ensure the current protections stay viable. In addition, due to section 208's ability to stay effective during a time when other vital provisions of the VRA have been struck down, section 208 should be looked to as a possible legislative model for future voter protections.

#### A. *Strengthening Section 208*

##### 1. *Amending Section 208*

The first way to strengthen section 208 and the protections it offers to LEP voters is for Congress to eliminate any residual confusion by amending the language to clarify what protections section

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107. See 52 U.S.C. § 10503; 52 U.S.C. § 10508.

108. See S. Rep. No. 97-417, *supra* note 28, at 62.

109. See Mendelson, *supra* note 2 (explaining the expansiveness of concerns over election integrity and inflated cries of fraud).

110. See Barbas, *supra* note 14, at 203-04.

208 provides and which voters it aims to help. The need for explicit protections has been recognized by many scholars before, but as courts began to more uniformly treat section 208 to include LEP voters, the need became less dire and scholarship surrounding the issue began to die off.<sup>111</sup> However, the point still remains that the language of the text seems to only directly protect illiterate individuals and this can cause confusion not only for election officials but also for voters themselves.<sup>112</sup> Without clarity, the protections offered by section 208 may go under-utilized.

## 2. Education

A lack of explicit protections for LEP voters allows confusion to exist, which can be seen through examples of poll workers denying LEP voters the right to bring a person of their choosing to assist them. This confusion can be either because the poll workers were unaware of the law, or because they interpreted it in a way that did not extend protection to the voter in question. In one instance, a New Orleans poll worker denied the right of Vietnamese voters to bring an assistant of their choice.<sup>113</sup> The poll worker incorrectly thought that the rights set out in section 208 only applied to those who speak languages also covered by section 203.<sup>114</sup> Another example of a violation based on confusion is that poll workers in Harris County, Texas required volunteer translators to stay at least 100 feet away from the polling location's doors and did not permit volunteers to re-enter after assisting someone.<sup>115</sup> The poll workers erroneously thought that the volunteers offering language assistance were electioneering and that if they were not specifically brought with a voter, then poll workers could impose restrictions on them.<sup>116</sup> These are just two examples of a much larger problem: many poll workers (and those who train them) do not know how to properly comply with section 208 and plenty of voters do not know

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111. *See id.* at 204-05.

112. *See id.*; 52 U.S.C. § 10508.

113. *See* Terry Ao Minnis, *Voting is a Universal Language: Ensuring the Franchise for the Growing Language Minority Community in Minnesota*, 105 MINN. L. REV. 2597, 2605 (2021).

114. *See id.*

115. *See* Hylton, *supra* note 99, at 517.

116. *See id.*

their rights well enough to know when they are being infringed upon.<sup>117</sup> The right of LEP individuals to vote is effectively deprived when they are not given the assistance necessary to make their vote meaningful.

With such blatant errors in mind, another recommendation to reduce confusion and therefore strengthen the effectiveness of section 208 is to better educate election officials and members of the public. The goal of such education campaigns would be to reduce enforcement errors and ensure every voter knows the protections that section 208 offers. Cook County, Illinois is already leading efforts in this direction.<sup>118</sup> In 2019, the Cook County Board of Commissioners passed the Voting Opportunity and Translation Equity ordinance.<sup>119</sup> This ordinance not only mandated ballots be translated into an additional eight languages that are not required by section 203, it also required signs to be posted at every polling location during early and election day voting informing voters of their rights under section 208.<sup>120</sup> In addition, the ordinance also required materials on section 208 to be included in election judge trainings.<sup>121</sup> These proactive steps are good examples of ways to begin educating the voters and election officials. Other localities and states should look to the efforts of Cook County, Illinois as an example of how to begin implementing similar programs to educate election officials—and voters themselves—to increase LEP voter access. Lastly, a push to adopt such procedures federally would likely produce the greatest benefit to LEP voters overall.

### 3. *Individual State Actions*

Similarly, some scholars have emphasized that discriminatory voting practices are best remedied by a shift in the mindset of policymakers rather than a reliance on the courts.<sup>122</sup> It will take

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117. *See id.* at 517-18.

118. *See* Minnis, *supra* note 113, at 2614.

119. *Id.*

120. *Id.* at 2614, 2619.

121. *Id.* at 2619.

122. *See* Will Hyland, *Voter ID: Combating Voter Fraud or Disenfranchising? A Comprehensive Analysis of Voter ID Laws, Native American Disenfranchisement, and Their Intersection*, 29 U. MIAMI INT'L & COMP. L. REV. 283, 283 (2021).

affirmative steps by state and local legislatures, as shown in Cook County, to make an impact.<sup>123</sup> The drawback to relying on policy-makers is that Cook County is an exception, rather than the norm—many areas that would benefit from such procedures do not currently have them and it may be difficult to enact reforms on the local, state, or federal level.

Not only does the lack of explicit reference to LEP voters in section 208 create confusion, but state laws can also be a hindrance. As referenced throughout this Note, numerous state laws have recently been challenged or are currently before courts dealing with limitations imposed on voter assistance.<sup>124</sup> While confusion around election laws under litigation can be a challenge, another area that can create questions is when laws that have been functionally stopped by consent decrees remain on the books.<sup>125</sup> For instance, the plaintiffs in *Thao v. Simon* and the Minnesota Secretary of State entered a consent decree that acknowledges that the state's three-voter assistance limitation violates section 208 and that it would not be enforced moving forward.<sup>126</sup> However, the consent decree was issued in April of 2020, and as of March 2023, the preempted language still remains in Minnesota Statute 204C.15.<sup>127</sup> While the consent decree permanently enjoined the enforcement of the restriction and training materials were revised to not include the restriction, allowing the language to remain in the statute can allow confusion to linger.<sup>128</sup> Thus, Minnesota and any other jurisdictions with similar circumstances should take steps to remove such language from their statutes.

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123. See Minnis, *supra* note 113.

124. See, e.g., ARK. CODE ANN. § 7-5-310(b)(4)(B) (West 2020); MO. REV. STAT. § 115.445.3 (1977).

125. See Minnis, *supra* note 113, at 2621.

126. *Id.*

127. MINN. STAT. ANN. § 204C.15 (West 2022) (“No person who assists another voter as provided in the preceding sentence shall mark the ballots of more than three voters at one election.”).

128. See Minnis, *supra* note 113, at 2621.

### *B. Looking Beyond Section 208*

It is prudent to fully address one of the most common concerns of section 208: the burden is on the individual to find their own assistant.<sup>129</sup> Some have argued that an affirmative duty requirement should be added to remove that burden from voters and place it with the government.<sup>130</sup> While in the abstract this sounds positive, it may not actually be practical, and at the very least it should be a separate provision from section 208. Additionally, as noted earlier, part of the purpose of section 208 was to preserve the concept of a secret ballot, something that is not possible with poll workers as voting assistants.<sup>131</sup> It could be that a technological solution to many of these problems is around the corner. Devices enabling translation and other needed accommodations could be made available at every polling location—improving equity, reducing secret ballot concerns, and avoiding the cost of individual translators. If that were to occur, section 208 could remain a backburner provision in terms of LEP voter assistance. This solution is hardly fantasy. Jurisdictions in Texas, for example, currently employ such technology.<sup>132</sup> More jurisdictions should explore doing so. A central argument against providing such equipment would be the financial element.<sup>133</sup> This type of change would likely have to be precipitated at a local level and on a volunteer basis, as section 203 has huge limitations geographically and in terms of the covered languages, making a federal solution less likely.

### *C. Section 208 as a Legislative Model: Targeted Protections*

As noted above, there are ways to strengthen section 208. Yet, it is also important to acknowledge that during a period of time when

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129. See *supra* Section II.C.

130. See Hylton, *supra* note 99, at 526.

131. See S. Rep. No. 97-417, *supra* note 28, at 62-63.

132. Matt Harab, *Harris County Unveils New Polling Technology for Non-English Speakers*, HOUS. PUB. MEDIA (Feb. 14, 2020, 2:50 PM), <https://www.houstonpublicmedia.org/articles/news/harris-county/2020/02/14/360756/harris-county-unveils-new-polling-technology/> [https://perma.cc/E6CS-D89F].

133. See Barbas, *supra* note 14, at 203.

portions of the VRA have been struck or rendered effectively useless, section 208 has continued to stand. This is not a result of section 208 going unchallenged; it has been challenged and at each point it has remained intact.<sup>134</sup> As election litigation swirls, section 208 might be a useful model for legislatures. Section 208 is constructed as a very targeted and narrowly-tailored provision that protects a specific set of rights for a specific set of individuals.<sup>135</sup> While this Note focused on the protections for LEP individuals, section 208 also extends the same rights to individuals with disabilities.<sup>136</sup> Thus, rather than an expansive coverage formula or sweeping idealist provisions intended to provide access and accessibility to everyone, the success of section 208 implies that an effective way to increase protections is to keep such protections narrow and targeted.<sup>137</sup>

## CONCLUSION

Due to the weakening of key legal protections typically used to defend equitable voter access, it has become necessary to explore underutilized and often overlooked portions of the VRA, such as section 208. Section 208 is a narrow but effective provision that provides a concrete remedy to an issue that has continued to plague the American election system: minority voter suppression. In the U.S., literacy tests have been formally abandoned, and no official national language has been adopted, but non-English language speakers are continuing to face an uphill battle to find adequate accommodations, let alone equity. This Note has attempted to revitalize the discussion around section 208 and highlight its gap-filler capabilities. In addition, this Note asserts that education, reform,

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134. *See, e.g.*, *OCA-Greater Houston v. Texas*, 867 F.3d 604 (5th Cir. 2017); *Arkansas United v. Thurston*, No. 5:20-CV-5193, 2022 WL 4097988, at \*1 (W.D. Ark. Sept. 7, 2022); *La Union del Pueblo Entero v. Abbott*, 614 F. Supp. 3d 509 (W.D. Tex. July 12, 2022); *Democracy N.C. v. N.C. State Bd. of Elections*, No. 1:20CV457, 2022 WL 715973, at \*1 (M.D.N.C. Mar. 10, 2022).

135. 52 U.S.C. § 10508 (providing the right to an assistant of one's choice to persons with disabilities and those who struggle with literacy).

136. *Id.*

137. This Note initially intended to look at a way to more broadly apply section 208, but after further research, the narrowness of the provision seems to be one of the things keeping it an effective piece of the VRA.

and targeted legislation modeled after section 208 is a way forward. Section 208 is a vital part of the VRA that has remained effective amidst litigation that has placed huge limitations on other more prominent provisions. Section 208 adds access without compromising election integrity and has remained intact in a very polarized election atmosphere. Thus, it should be used at least as a short-term solution to address discrimination in voting, while hopefully moving forward to an even more equitable and ideal path.

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