

No. 16-51126

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCA-GREATER HOUSTON; MALLIKA DAS,

Plaintiffs-Appellees

v.

STATE OF TEXAS; CARLOS CASCOS, In his official capacity as
Texas Secretary of State and Chief Election Officer,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*

T.E. WHEELER, II
Acting Assistant Attorney General

TOVAH R. CALDERON
ERIN H. FLYNN
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-2195

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INTEREST OF THE UNITED STATES

This case concerns the interpretation and application of Section 208 of the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10508, which broadly protects the rights of voters who are blind, have a disability, or cannot read or write to obtain voting assistance from a person of their choice and free from undue influence by their employers or unions. Section 208 of the VRA (Section 208) extends voting rights protections to people with disabilities and literacy difficulties and implements, in part, the rights afforded by Section 2 of the VRA, 52 U.S.C. 10301

(guaranteeing that an equal opportunity to participate in the political process is not denied or abridged based on race, color, or in contravention of the language minority guarantees of the VRA), and Section 201 of the VRA, 52 U.S.C. 10501 (banning the use of literacy tests), both of which the Attorney General has broad authority to enforce. See 52 U.S.C. 10308(d), 10504.

For United States citizens who are limited English proficient (LEP), Section 208 establishes a critical safety net that ensures meaningful access to the franchise. In jurisdictions with particular concentrations of citizens who are members of a single language minority group, have depressed literacy rates, and have limited English proficiency, Section 203 of the VRA requires multilingual election programs. See 52 U.S.C. 10503; 28 C.F.R. 55.1-55.24. In addition, Section 4(e) of the VRA protects the voting rights of citizens educated in American-flag schools in a language other than English, which in some circumstances requires multilingual election programs. See 52 U.S.C. 10303(e). But both provisions apply only in certain jurisdictions or to certain languages. Because Section 208 applies nationwide, LEP citizens who reside in jurisdictions that are not required to conduct multilingual election programs—or who reside in jurisdictions that conduct multilingual election programs but who speak a language other than that of the predominant language minority group—can nonetheless access the election process and cast a meaningful ballot by obtaining the necessary assistance from a

person of the voter's choice. In the past 15 years, the Justice Department has brought claims under Section 208 in 11 jurisdictions. See <https://www.justice.gov/crt/voting-section-litigation> (listing cases raising claims under Section 208). Accordingly, the United States has a substantial interest in ensuring the proper interpretation and uniform enforcement of Section 208 across the country.

The United States files this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2).

STATEMENT OF THE ISSUE

Section 208 of the VRA provides that “[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, 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. The United States will address the following issue only:

Whether the district court correctly held that “to vote” or “voting” in Section 208 “includes not only the mechanical reading and marking of a ballot, but all other activities required of voters at a polling place to meaningfully and effectively exercise their right to vote.” ROA.1385.¹

¹ We address only the district court’s interpretation of Section 208. We take no position on the other issues raised on appeal, including plaintiffs’ standing, the
(continued...)

STATEMENT OF THE CASE

1. *Section 208 Of The VRA*

Section 208 of the VRA states that “[a]ny voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice,” provided the person is not “the voter’s employer or agent of that employer or officer or agent of the voter’s union.” 52 U.S.C. 10508. The VRA defines the terms “vote” and “voting” to encompass “all action necessary to make a vote effective,” including, but not limited to, “registration * * * or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast.” 52 U.S.C. 10310(c)(1).

Congress enacted Section 208 in 1982, upon finding that “[c]ertain discrete groups of citizens are unable to exercise their rights to vote without obtaining assistance in voting including aid within the voting booth.” See S. Rep. No. 417, 97th Cong., 2d Sess. 62 (1982) (Senate Report). Congress recognized that this need for assistance may render such groups—namely, voters who are blind, have a disability, lack a written language, or are “unable to read or write sufficiently well to understand the election material and the ballot”—more susceptible to undue

(...continued)

application of Section 208 to the facts of this case, or the scope of the district court’s injunction.

influence, manipulation, and discrimination. Senate Report 62; see also H. Rep. No. 227, 97th Cong., 1st Sess. 14 (1981) (House Report) (stating that “numerous practices and procedures,” including the “failure to provide or abusive manipulation of assistance to illiterates,” “act as continued barriers to registration and voting”); House Report 21, 23 (while discussing the protections extended to language minorities under Section 203 of the VRA in 1975, stating that numerous federal courts in the early 1970s found that “English-only elections in areas with substantial non-English speaking citizens operated as a test or device to keep citizens from voting”); cf. *Garza v. Smith*, 320 F. Supp. 131, 133-139 (W.D. Tex. 1970) (three-judge court) (holding that Texas law extending voter assistance to voters with physical disabilities, but not to voters who could not read or write, violated equal protection), vacated on other grounds, 401 U.S. 1006 (1971).

Congress therefore provided an opportunity for these potentially vulnerable voters to turn to those whom they trusted to render assistance. “To limit the risks of discrimination” and “avoid denial or infringement of the[se groups’] right to vote,” Congress mandated that such voters “be permitted to have the assistance of a person of their own choice” during the voting process, including within the voting booth. Senate Report 62. It simultaneously prohibited assistance by a voter’s employer or union officer, thereby limiting opportunities for the voter’s

preference to be overborne by coercive influences or for the voter to be misled into voting for someone other than his or her candidate of choice. See *id.* at 62-64.

In passing Section 208, Congress sought to reinforce the VRA's nationwide ban on literacy tests. See Senate Report 63; see also 52 U.S.C. 10501. Congress explained that Section 208 would preempt state election laws "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." Senate Report 63. "[A] procedure could not," for example, "deny the assistance at some stages of the voting process during which assistance was needed, nor could it provide that a person could be denied assistance solely because he could read or write his own name." *Ibid.*² Thus, Congress anticipated that Section 208 would preempt state laws that stood as an obstacle to accomplishing the federal guarantee that covered

² See also, *e.g.*, *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 281-282, 478, 481, 844, 863 (1981) (recounting instances in which racial minorities were harassed for seeking voting assistance from a person of their choice or where assistance in voting was used to intimidate voters); *id.* at 497, 537, 780 (citing examples of unduly restrictive state laws that impeded minority participation by allowing only registered voters within the same county or precinct, or individuals who had helped no more than five voters already, to provide voting assistance); *id.* at 899, 940, 1584, 1617, 1674-1675, 1711-1712, 1769 (stating that poll workers have used assistance provisions to intimidate illiterate voters and that States have used limitations on voter assistance to dilute the rights of minority voters).

voters would be able to obtain assistance from a non-prohibited person of their choice at any stage of the voting process.

2. *Proceedings Below*

The Organization of Chinese Americans (OCA)-Greater Houston and Mallika Das, an individual registered voter, sued the State of Texas, the Texas Secretary of State, Williamson County, and Williamson County Elections Department. They alleged that defendants prohibited Das, a voter in Williamson County who was born in India and is LEP, from relying on her son's assistance to cast a vote in the 2014 general election and generally restricted access to assistance in violation of Section 208 of the VRA. ROA.103-104; see also ROA.518.

The state defendants (Texas or the State) and plaintiffs filed cross-motions for summary judgment. As relevant here, those motions disputed the scope of Section 208. Plaintiffs argued that restricting a voter's choice of interpreter based on the interpreter's registration status conflicted with Section 208 both by infringing on the voter's right to use his or her chosen assistor throughout the voting process and by restricting voting assistance by persons who are otherwise eligible to provide it under Section 208. ROA.522-526. Texas countered that Section 208 sets requirements aimed only at ballot-box activities, *i.e.*, helping protected voters read and mark their ballots free from intimidation by their employers or unions. ROA.721, 733-736; see also ROA.378.

The district court granted summary judgment to OCA-Greater Houston. ROA.1367-1387. The court rejected the argument that Section 208 applies only to activities inside the voting booth and concluded instead that it applies “not only [to] the mechanical reading and marking of a ballot, but [to] all other activities required of voters at a polling place to meaningfully and effectively exercise their right to vote.” ROA.1385.

The court based its conclusion on an examination of the VRA’s statutory scheme as a whole, finding that Section 208’s text alone did not resolve whether its coverage extended beyond the ballot box. ROA.1381-1382. The court found that Congress’s initial enactment of and subsequent amendments to the VRA broadly addressed myriad barriers to voting, including literacy tests and the use of English-only election materials that hampered the ability of racial and language minorities to participate effectively in the electoral process. ROA.1382-1383. Section 208, the court found, added to the VRA’s preexisting protections to “afford blind, disabled, and limited-English proficient voters ‘the same opportunity to vote enjoyed by all citizens.’” ROA.1384 (quoting Senate Report 62).

The district court found that Congress, in enacting Section 208, recognized that “voting is a *process*” that includes but extends beyond the voting booth; accordingly, the legislative history made clear that jurisdictions “could not deny the assistance [guaranteed by Section 208] at some stages of the voting process

during which assistance was needed.” ROA.1384 (quoting Senate Report 63); see also ROA.1384 n.9. The court explained that if Section 208 applied to no more than the “mechanical reading and marking of a ballot,” voters who are blind, have other disabilities, or have literacy difficulties would lack any guarantee under federal or Texas law to have a person of their choice help them “navigate polling stations,” “communicate with election officers,” and “understand and fill out any required forms.” ROA.1385. Such a limitation, the court stated, would frustrate Congress’s intent to protect the right of such voters to obtain assistance from “a person whom [they] trust[] and who cannot intimidate [them].” ROA.1385 (brackets in original) (quoting Senate Report 62).

SUMMARY OF ARGUMENT

The text, purpose, and legislative history of Section 208 of the VRA make clear that the federal guarantee of assistance in voting applies to the entire voting process and not merely to ballot-box activities. Although the district court found that Section 208 did not itself resolve the parties’ dispute over “the scope of what it means ‘to vote,’” and that the statutory text therefore was ambiguous, the court overlooked the statutory definitions in Section 10310(c), which make clear that the terms “vote” and “voting” encompass all aspects of the voting process. ROA.1381-1386. A contrary interpretation that would limit Section 208’s coverage to assistance inside the voting booth would be inconsistent with the plain

statutory text of the VRA and would frustrate the broad protections that Congress intended to afford to covered voters under Section 208. It also would undermine the VRA's overarching purpose to ensure an electoral process equally open to all voters and free from discrimination.

ARGUMENT

SECTION 208 APPLIES TO ALL ASPECTS OF THE VOTING PROCESS, NOT SIMPLY TO ASSISTANCE WITHIN THE VOTING BOOTH

Under established principles of statutory interpretation, this Court should reach the same conclusion as the district court as to the scope of Section 208's protections—namely, that Section 208 applies to the entire voting process and guarantees that voters with disabilities or literacy difficulties are able to obtain assistance from a person of their choice (other than their employer or union officer) both within and outside of the voting booth.

In resolving issues of statutory interpretation, courts look to the statutory language and, if it is plain, apply it according to its terms. See *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004). “The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which the language is used, and the broader context of the statute as a whole.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). “When Congress provides a specific definition of a term,” this Court “must accept that meaning and limit [its] analysis to the prescribed

definition.” *United States v. Transocean Deepwater Drilling, Inc.*, 767 F.3d 485, 490 (5th Cir. 2014). Where the statutory text lends itself to more than one reasonable interpretation, this Court examines, among other things, a statute’s legislative history, predecessor statutes, and pertinent court decisions to find the interpretation that is most harmonious with congressional intent. See, e.g., *Salazar v. Maimon*, 750 F.3d 514, 519 (5th Cir. 2014); *Serna v. Law Office of Joseph Onwuteaka, P.C.*, 732 F.3d 440, 445 (5th Cir. 2013).

Here, the VRA makes clear that Section 208 extends to all aspects of voting. To be sure, Section 208—which provides that “[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,” unless the person is “the voter’s employer or agent of that employer or officer or agent of the voter’s union”—does not explicitly state that “assistance to vote” extends to the entire voting process. 52 U.S.C. 10508. But the VRA defines the terms “vote” and “voting” to encompass “all action necessary to make a vote effective,” including, *inter alia*, “registration * * * or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast.” 52 U.S.C. 10310(c)(1). Thus, the statute unambiguously establishes that voting is not limited to ballot-box activities. Rather, it encompasses a broad range

of activities that precede, include, and follow the physical act of reading, marking, and casting a ballot.

Section 208's plain meaning is confirmed by its legislative history. That history demonstrates Congress's clear intent for the provision to allow covered voters to obtain assistance from a person of their choice and free from undue influence throughout the voting process. The Senate Report expressly stated that "a procedure could not deny the assistance at some stages of the voting process during which assistance was needed." Senate Report 63; see also *id.* at 62 ("Certain discrete groups of citizens are unable to exercise their rights to vote without obtaining assistance in voting *including aid within the voting booth.*") (emphasis added). If Congress had intended for Section 208 to apply only to the voting booth, there would have been no need for it to reference a voting process comprised of multiple stages or to specify that voting assistance "includ[ed]" aid within the voting booth. In fact, to interpret Section 208's guarantees as limited to the voting booth would frustrate Congress's purpose in enacting Section 208 by providing poll workers, employers, and union officers ample opportunity to intimidate, harass, or mislead the precise voters who Congress found vulnerable to such influences. See pp. 4-7 & n.2, *supra* (explaining the reasons for Section 208's enactment and citing legislative testimony supporting Congress's concerns).

Thus, if this Court addresses Section 208 it should conclude that federally protected voting assistance under Section 208 extends beyond the voting booth for persons with disabilities and those who, because of language or literacy limitations, are “unable to read or write sufficiently well to understand the election material and the ballot,” Senate Report 62. See, *e.g.*, *United States v. Berks Cnty.*, 250 F. Supp. 2d 525, 527 (E.D. Pa. 2003) (“[T]he meaningful right to vote extends beyond the immediate four corners of the voting machine.”); *United States v. Berks Cnty.*, 277 F. Supp. 2d 570, 584 (E.D. Pa. 2003) (requiring defendants to comply with Section 208 by permitting “assistance in voting, including assistance in the voting booth, by a person of [the voter’s] choice,” but not the voter’s employer or union representative, “in all aspects of the voting process”).

CONCLUSION

If this Court reaches the question of how Section 208 should be interpreted, this Court should affirm the district court's interpretation of "to vote" or "voting" in Section 208 as applying "not only [to] the mechanical reading and marking of a ballot, but [to] all other activities required of voters at a polling place to meaningfully and effectively exercise their right to vote." ROA.1385.

Respectfully submitted,

T.E. WHEELER, II
Acting Assistant Attorney General

s/ Erin H. Flynn
TOVAH R. CALDERON
ERIN H. FLYNN
Attorneys
U.S. Department of Justice
Civil Rights Division
Appellate Section
Ben Franklin Station
P.O. Box 14403
Washington, D.C. 20044-4403
(202) 514-2195

CERTIFICATE OF SERVICE

I certify that on February 6, 2017, I electronically filed the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. All participants in this case who are registered CM/ECF users will be served by the appellate CM/ECF.

I further certify that on February 6, 2017, I served a copy of the foregoing brief on the following counsel by electronic mail:

Jerry Vattamala
Asian American Legal Defense & Educational Fund
99 Hudson Street, 12th Floor
New York, NY 10013
jvattamala@aaldef.org

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney

CERTIFICATE OF COMPLIANCE

I certify that the foregoing BRIEF FOR THE UNITED STATES AS
AMICUS CURIAE:

(1) complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) because it contains 2906 words; and

(2) complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007, in 14-point Times New Roman font.

s/ Erin H. Flynn
ERIN H. FLYNN
Attorney

Dated: February 6, 2017