STATE OF MINNESOTA

IN SUPREME COURT

A20-1017

Ramsey County

DSCC, et al.,

Respondents,

Steve Simon, in his official capacity as Minnesota Secretary of State,

Respondent,

Republican Party of Minnesota, et al.,

Appellants.

Gildea, C.J.
Thissen, J., took no part

Filed: October 28, 2020
Office of the Appellate Courts

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S Y L L A B U S

1. The district court did not abuse its discretion in finding that a likelihood of success on the merits was shown on the claim that the voter-assistance limit in Minn. Stat. § 204C.15, subd. 1 (2018), for ballot marking, is preempted by section 208 of the Voting Rights Act, 52 U.S.C. § 10508, but the district court committed an error of law, and thus abused its discretion, in finding that a likelihood of success on the merits was shown on the claim that the ballot-collection and delivery limit in Minn. Stat. § 203B.08, subd. 1 (2018), is preempted.

2. The district court abused its discretion in finding that a likelihood of success on the merits was shown on the claim that the ballot-collection and delivery limit in Minn. Stat. § 203B.08, subd. 1, impermissibly burdens the right to vote and therefore violates Article I, Section 2 and Article VII, Section 1 of the Minnesota Constitution.

3. The district court abused its discretion in finding that a likelihood of success on the merits was shown on the claim that the ballot-collection and delivery limit in Minn. Stat. § 203B.08, subd. 1, impermissibly burdens political speech and associational rights, in violation of the First Amendment to the United States Constitution and Article I, Section 3 of the Minnesota Constitution.

Affirmed in part, reversed in part.

O P I N I O N

GILDEA, Chief Justice.

This appeal requires consideration of the limits in Minnesota Statutes on the number of voters that an individual may assist in marking a ballot, Minn. Stat. § 204C.15, subd. 1 (2018) (stating that a person cannot "mark the ballots of more than three voters at one election"), and the number of completed absentee ballots that an individual may collect and deliver, Minn. Stat. § 203B.08, subd. 1 (2018) (limiting a person to delivering completed ballots for "not more than three voters in any election"). Respondents DSCC and DCCC (collectively, the Democratic committees) are national committees of the Democratic Party that engage in organizing and voter activities in support of senate and congressional candidates. In a complaint filed in district court, the Democratic committees asserted that the statutory limit on the number of voters that may be assisted in marking a ballot and the limit on the number of completed ballots that may be collected for delivery conflict with and therefore are preempted by section 208 of the federal Voting Rights Act, 52 U.S.C. § 10508. The Democratic committees also asserted that these limits burden the right to vote, in violation of the Minnesota Constitution, Article I, Section 2 and Article VII, Section 1; and burden political speech and associational rights, in violation of the First Amendment to the United States Constitution and Article I, Section 3 of the Minnesota Constitution. Appellants Republican Party of Minnesota and Republican National Committee (collectively, the Republican committees), intervened in the district court proceeding.

The Democratic committees moved for a temporary injunction in the district court, which respondent Steve Simon, Minnesota Secretary of State, and the Republican committees opposed. After briefing and a hearing, the district court concluded that the Democratic committees were likely to succeed on the merits of their claims and had demonstrated that a temporary injunction was warranted. *See* Minn. R. Civ. P. 65.02 (stating that a temporary injunction should be granted if "sufficient grounds exist"). The court therefore temporarily enjoined the Secretary of State from taking steps to enforce or require compliance with the voter-assistance and ballot-collection limits.

The Republican committees filed an appeal on August 3, 2020, and on August 12, 2020, filed a petition for accelerated review. We granted the petition and directed the parties to file briefs on an expedited schedule. We held oral argument on September 3, 2020. In an order filed on September 4, 2020, we affirmed the district court's decision on the preemption claim as to the limit on the number of voters that may be assisted in marking a ballot, Minn. Stat. § 204C.15, subd. 1, but otherwise reversed the district court's decision. This opinion explains the reasons for our decision.

FACTS

In general, only the voter can mark the ballot that the voter receives for a particular election. *See, e.g.*, Minn. Stat. §§ 203B.08, subd. 1 (stating that an "eligible voter who receives" an absentee ballot "shall mark" the ballot); 203B.081, subd. 3(c) (2018) (directing a voter who votes in person early to "immediately retire to a voting station" and "mark the ballot" issued to the voter); 204C.13, subds. 1–5 (2018) (describing the process of giving a voter who votes in person on election day "only one ballot," allowing the voter

to "retire alone" to the voting booth, directing the voter to "mark" the ballot and then "immediately deposit" the ballot in the box). A person, other than the voter, who marks the ballot of a voter "except as authorized by law and as directed by the voter," commits a crime. Minn. Stat. § 204C.16 (2018).

Minnesota has, for decades, allowed voters to use the assistance of another individual in the voting process in certain situations.[1] First, a voter who needs "assistance because of inability to read English or physical inability to mark a ballot" may "obtain the assistance of any individual the voter chooses," except for the "voter's employer, an agent of the voter's employer, an officer or agent of the voter's union, or a candidate for election." Minn. Stat. § 204C.15, subd. 1. Second, a voter who uses an absentee ballot to vote, after marking the ballot and sealing it in a return envelope, "may designate an agent to deliver in person the sealed absentee ballot return envelope to the county auditor or municipal clerk or to deposit the return envelope in the mail." Minn. Stat. § 203B.08, subd. 1. In both cases, however, the person who assists the voter, either in marking a ballot or delivering a marked ballot, cannot assist "more than three voters." Minn. Stat. § 204C.15, subd. 1 (stating that the person assisting "shall mark the ballots of [no] more than three voters at

[1] The first limit on voter assistance was enacted in 1889, *see* Minn. Gen. Stat. ch. 1, tit. 2, § 154 (1891) (limiting a person providing assistance in marking a ballot to doing so for not "more than six (6) . . . electors . . . at one (1) election"). The three-voter limit on assistance in marking a ballot has been part of Minnesota law since 1894, Minn. Gen. Stat. ch. 1, § 108 (1894), and the limit on delivering a completed absentee ballot has been part of Minnesota law since 1997, Act of May 13, 1997, ch. 147, § 16, 1997 Minn. Laws 913, 920 (amending Minn. Stat. § 203B.08, subd. 1, by authorizing a voter to "designate an agent" to deliver a completed absentee ballot and limiting that agent to doing so for no more than three voters).

one election"); Minn. Stat. § 203B.08, subd. 1 (stating that the agent cannot deliver or mail the ballots for "more than three voters in any election").[2]

In February 2018, the State charged a former candidate for public office with criminal offenses for unlawfully marking a voter's ballot and other election-related offenses. *State v. Thao*, No. 62-CR-18-927 (Ramsey Cnty. Dist. Ct.). In that proceeding, the district court concluded that a separate restriction on voter assistance, which prohibits a candidate from providing assistance to a voter in marking a ballot, Minn. Stat. § 204C.15, subd. 1, is preempted by section 208 of the Voting Rights Act. The defendant was later found not guilty based on stipulated facts and a reasonable reliance defense. *State v. Thao*, No. 62-CR-18-927, Verdict (Ramsey Cnty. Dist. Ct. Nov. 9, 2018).

Thereafter, the candidate (and others) challenged the candidate and three-voter-assistance limits in Minn. Stat. § 204C.15, subd. 1, asserting that those restrictions burden the right to vote, in violation of the First and Fourteenth Amendments to the United States Constitution. *Thao v. Minn. Sec'y of State*, No. 62-CV-20-1044, Complaint (Ramsey Cnty. Dist. Ct. filed Feb. 11, 2020). The plaintiffs and the Secretary of State entered into a consent decree, agreeing that the candidate and three-voter-assistance limits are preempted by the Voting Rights Act. The Secretary of

[2] Minnesota also allows certain voters to designate an agent to deliver a ballot to the voter. *See* Minn. Stat. § 203B.11, subd. 4 (2018) (allowing an agent to deliver a ballot to "an eligible voter who would have difficulty getting to the polls because of incapacitating health reasons, or who is disabled, or who is a patient" in certain facilities, but requiring the agent to "have a preexisting relationship with the voter" and limiting the agent to delivering ballots to "no more than three persons in any election"). This statutory limit is not at issue in this appeal.

State agreed to notify election officials that these limits are unenforceable and to revise election training materials before the general election on November 3, 2020, to eliminate references to these restrictions. The district court entered this consent decree on April 21, 2020.[3]

The complaint in this case was filed on January 17, 2020. The Democratic committees asserted that the three-voter-assistance limits imposed by sections 203B.08 and 204C.15 "directly contradict federal law," unduly burden the fundamental right to vote, and infringe on the "core political" speech and associational rights of organizations and citizens that work to increase voter turnout. Specifically, the Democratic committees alleged that the three-voter-assistance limits impose burdens on voters who need assistance due to language barriers or disabilities in marking a ballot or delivering a completed ballot. Relying on the *Thao* criminal case, the Democratic committees asserted that the criminal penalties for violating the voter-assistance limits deter volunteers and other workers from engaging in voter activities on behalf of political organizations. Finally, the Democratic committees alleged that their get-out-the-vote efforts communicate messages regarding participation in democratic elections that are protected political speech and involve associational rights that are burdened by Minnesota's voter-assistance limits.

On March 12, 2020, the Democratic committees moved for a temporary injunction. In support of their motion, the Democratic committees submitted declarations from

[3] The Republican committees moved to intervene in this proceeding, but the district court did not resolve this motion before the consent decree was entered. Final judgment was entered on April 22, 2020.

individuals who work with Minnesotans with disabilities and with Hmong Americans, Somali Americans, and Native Americans living in Minnesota; researchers who focus on voter turnout in communities in which voters need assistance due to language or physical disabilities or socioeconomic or geographic factors; and community organizers for the Democratic committees. These declarations explained the challenges faced by voters with disabilities or who do not speak English as a primary language and, therefore, the need for assistance in voting. The Republican committees and the Secretary of State opposed the motion.

Following a hearing, the district court granted the motion for a temporary injunction.[4]

ANALYSIS

We review the district court's decision to grant a temporary injunction for an abuse of discretion. *Fannie Mae v. Heather Apartments Ltd. P'ship*, 811 N.W.2d 596, 599 (Minn. 2012); *see Eakman v. Brutger*, 285 N.W.2d 95, 97 (Minn. 1979) ("The sole issue on appeal [from an order denying a temporary injunction] is whether there was a clear abuse of . . . discretion."). The district court abuses its discretion when it grants a temporary injunction based on an erroneous interpretation of the law. *Dalhberg Bros. v. Ford Motor Co.*, 137 N.W.2d 314, 323 (Minn. 1965).

[4] The district court also denied the Secretary of State's motion to dismiss, based on mootness and lack of standing; and granted the Republican committees' motion to intervene. These decisions are not challenged in this appeal, and based on our review of the record, we agree that standing is not at issue. *See Minn. Sands, LLC v. Cnty. of Winona*, 940 N.W.2d 183, 192 n.9 (Minn. 2020) (noting that we have independent authority to consider standing).

Because a temporary injunction is granted before a trial on the merits, "a showing of irreparable harm is required to prevent undue hardship to the party against whom the injunction is issued, whose liability has not yet been determined." *Cherne Indus., Inc. v. Grounds & Assocs., Inc.*, 278 N.W.2d 81, 92 (Minn. 1979); *see Pickerign v. Pasco Mktg., Inc.*, 228 N.W.2d 562, 564 (Minn. 1975) (explaining that a temporary injunction is appropriate "when it is apparent that the rights of a party will be irreparably injured before a trial on the merits . . . or where the relief sought in the main action will be ineffectual or impossible to grant"). We consider five factors in reviewing the district court's irreparable harm determination. *See Miller v. Foley*, 317 N.W.2d 710, 712 (Minn. 1982) (stating that "five factors [are] to be considered in making [the] determination" that "the rights of a party will be irreparably injured before a trial on the merits is held"). They are:

> (1) The nature and background of the relationship between the parties preexisting the dispute giving rise to the request for relief.
>
> (2) The harm to be suffered by plaintiff if the temporary restraint is denied as compared to that inflicted on defendant if the injunction issues pending trial.
>
> (3) The likelihood that one party or the other will prevail on the merits when the fact situation is viewed in light of established precedents fixing the limits of equitable relief.
>
> (4) The aspects of the fact situation, if any, which permit or require consideration of public policy expressed in the statutes, State and Federal.
>
> (5) The administrative burdens involved in judicial supervision and enforcement of the temporary decree.

Dalhberg Bros., 137 N.W.2d at 321–22.

We begin with the likelihood of success on the merits. The Democratic committees' claims assert constitutional challenges to Minnesota's voter-assistance limits. Statutes are presumed constitutional and the party that asserts otherwise has a heavy burden to overcome that presumption, *see Kimberly-Clark Corp. v. Comm'r of Revenue*, 880 N.W.2d 844, 848 (Minn. 2016), but here we view that presumption through the lens of the First Amendment rights at issue, *see State ex rel. Humphrey v. Casino Mktg. Grp., Inc.*, 491 N.W.2d 882, 885 (Minn. 1992) (stating, in reviewing a temporary injunction, that the presumption "cannot be reconciled with the unique protections afforded by the first amendment").

I.

We start with the Democratic committees' preemption claim.[5] The Democratic committees assert that Minnesota's statutory limits on assistance in marking a ballot and delivering a marked ballot conflict with federal law, specifically section 208 of the Voting Rights Act. Under this law, a voter "who requires assistance to vote" due to a disability or

[5] Preemption is generally disfavored, *Martin ex rel. Hoff v. City of Rochester*, 642 N.W.2d 1, 11 (Minn. 2002), on the assumption that Congress does not intend to supersede the States' police powers, especially in a field historically occupied by state law, *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485–86 (1996). The Supreme Court has not applied this principle in Election Clause cases, *see* U.S. Const. art. I, § 4, cl. 1, because when Congress legislates pursuant to that clause with respect to the times, places, or manner of elections, "the reasonable assumption is that the statutory text accurately communicates the scope of Congress's pre-emptive intent." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 13–14 (2013) (holding that the federal voter registration act preempted Arizona registration regulation); *see also Foster v. Love*, 522 U.S. 67, 69 (1997) (stating that this clause grants Congress the power to override state law "by establishing uniform rules for federal elections, binding on the States"); *Smiley v. Holm*, 285 U.S. 355, 366–67 (1932) (stating that this clause gives Congress supervisory power over the subject of elections, allowing it to supplement state regulations or substitute its own regulations).

"inability to read or write may be given assistance by a person of the voter's choice," other than the voter's employer, an agent of the employer, or an officer or agent of the voter's union. 52 U.S.C. § 10508. The Democratic committees assert that Minnesota's three-voter limits on assistance conflict with section 208 because those limits restrict a voter's right under section 208 to have the assistance of the "person of the voter's choice."

Federal law generally prevails over a conflicting state law. U.S. Const. art. VI, cl. 2 (stating that the "Laws of the United States" are "the supreme Law of the Land"). Preemption is "primarily an issue of statutory interpretation," which is subject to de novo review. *In re Estate of Barg*, 752 N.W.2d 52, 63 (Minn. 2008). "Congressional purpose is the ultimate touchstone" of our inquiry into preemption by a federal law.[6] *Id.* State law may be preempted "by express provision, by implication, or by a conflict between federal and state law." *N.Y. State Conf. of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). Only conflict preemption is at issue here. "Conflict preemption occurs when compliance with both state and federal laws is impossible, or when the state law is an obstacle to the accomplishment" of Congress's purpose and objectives. *In re Estate of Barg*, 752 N.W.2d at 64 (citations omitted) (internal quotation marks omitted).

[6] The district court looked to the *Thao* consent decree as the "best evidence of preemption." This is an error of law. The *Thao* consent decree is not binding in this case. *See Hentschel v. Smith*, 153 N.W.2d 199, 206 (Minn. 1967) (explaining that a consent decree "is based wholly on the consent of the parties and there is no judicial inquiry into the facts or the law applicable to the controversy"); *Hafner v. Hafner*, 54 N.W.2d 854, 858 (Minn. 1952) (stating that the decree "rests on the consent of the parties" and is not a judicial determination of the parties' rights). "Congressional purpose," rather than a non-binding agreement, is the best evidence of preemption. *Gretsch v. Vantium Cap., Inc.*, 846 N.W.2d 424, 432 (Minn. 2014).

For the preemption claim, the parties rely primarily on two cases. The Democratic committees point to *OCA-Greater Houston v. Texas*, where the Fifth Circuit Court of Appeals held that section 208 preempted a Texas statute that limited the persons who could provide interpretation assistance to voters to those persons registered to vote in the same county as the voter needing assistance. 867 F.3d 604, 615 (5th Cir. 2017). The court first looked to the definition of "voting" in 52 U.S.C. § 10310(c)(1) ("voting" includes "all action necessary to make a vote effective in any . . . election, including . . . registration, . . . casting a ballot, and having such ballot counted properly").[7] 867 F.3d at 614. Then, the court concluded that the interpreter residence requirement "impermissibly narrows the right guaranteed" by section 208 because a state "cannot restrict" that right by "defining terms more restrictively than as federally defined." *Id*. at 615.

The Republican committees rely on a different Texas voter-assistance limit that was upheld in *Ray v. Texas*, No. 2-06-CV-385, 2008 WL 3457021 (E.D. Tex. Aug. 7, 2008). There, the statute required a voter applying for an early voting ballot to have a witness sign the application if the voter was unable to do so, with the signer limited to doing so for only one voter. *Id*. at *1. The federal district court rejected the plaintiffs' preemption claim, noting that section 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." *Id*. at *7. Deciding that the congressional intent with section 208 was "to allow the voter to choose *a* person whom the voter trusts to provide assistance," the court concluded that federal law

[7] Section 208 does not expressly incorporate the definition in section 10310(c), and we do not need to decide, for purposes of this case, whether that definition applies here.

did not "preclude all efforts by the State to regulate elections by limiting the available choices to certain individuals." *Id.*

The Democratic committees contend that, apart from the prohibition on assistance from employers and union representatives, section 208 provides voters with an unencumbered right to the assistant of the voter's choice at all stages of voting, including the marking of ballots and the delivery of marked ballots.[8] The Republican committees disagree. They contend that Congress intended to preempt state laws on voter assistance only to the extent that those laws unduly burden the right recognized in section 208. In the absence of any evidence that a voter has been unable to vote due to exhaustion of the three-voter limits, they contend that the preemption claim fails as a matter of law.[9] Finally, they assert that voting by absentee ballot is a privilege subject to conditions imposed by the State.

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[8] Relying on the *Thao* consent decree and an opinion of the Attorney General issued after that decree was entered by the district court, the Secretary of State asks that we limit our review in this appeal to the validity of the limit on delivery of marked ballots, imposed by Minn. Stat. § 203B.08. As noted above, the *Thao* consent decree is not binding in this appeal, and neither is the Attorney General's opinion binding on us, *see City of St. Louis Park v. King*, 75 N.W.2d 487, 494 (Minn. 1956); *see also Star Trib. Co. v. Univ. of Minn. Bd. of Regents*, 683 N.W.2d 274, 289 (Minn. 2004) (noting that the "conclusory approach" of a letter opinion "renders it less than persuasive"). The district court addressed the preemption claim asserted under section 204C.15, and the Republican committees assert on appeal that the court committed an error of law in its decision on this claim. We therefore decline to limit our review here.

[9] For this argument, the Republican committees cite to the report of the United States Senate, and the comment that state laws would be preempted by section 208 "to the extent that they unduly burden the right" provided by the federal law. S. Rep. No. 97-417 (1982), *as reprinted in* 1982 U.S.C.C.A.N. 177, 1982 WL 25033, at *62–63. We need not consider this report because the congressional intent is unambiguous in the plain language of section 208.

No one contends that the language of section 208 or the language of the voter-assistance limits, in sections 203B.08 and 204C.15, is ambiguous. Thus, we start with the plain language of the statutes, beginning with the federal statute. *See, e.g.*, *Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 9–12 (2013) (considering the language of the Voting Rights Act and the challenged Arizona statute). Section 208 states that "[a]ny voter" requiring assistance to vote due to "blindness, disability, or inability to read or write" may be assisted "by a person of the voter's choice," with two exceptions: the assistance cannot be provided by the voter's employer (including an agent), or an officer or agent of the voter's union. 52 U.S.C. § 10508.

Turning to the state statutes, section 204C.15, subdivision 1, allows "[a] voter" with a physical or language disability to obtain the assistance of "any individual the voter chooses," subject to a mandatory limit: the assistant "shall [not] mark the ballots of more than three voters at one election." Minn. Stat. § 204C.15, subd. 1; *see* Minn. Stat. § 645.44, subd. 16 (2018) (" 'Shall' is mandatory."). Both section 208 and section 204C.15 describe the person who can provide assistance in permissive terms, because a voter "may" have assistance from another person, with the eligible assistant described broadly, i.e., "a person of the voter's choice," 52 U.S.C. § 10508, or "any individual the voter chooses," Minn. Stat. § 204C.15, subd. 1.

This plain-language comparison leads to the conclusion that Minnesota's three-voter limit on marking assistance can be read to stand as an obstacle to the objectives and purpose of section 208 because it could disqualify a person from voting if the assistant of choice is, by reason of other completed assistance, no longer eligible to serve as the

voter's "choice." *See, e.g.*, 52 U.S.C. § 10101(a)(1) (stating that all citizens who are qualified to vote "shall be entitled and allowed to vote," state law "to the contrary notwithstanding"). This is comparable to the impermissible narrowing that the Fifth Circuit rejected in *OCA-Greater Houston*, 867 F.3d at 615 (holding that a residency requirement for an interpreter providing assistance to the voter in voting "impermissibly narrows the right" provided by section 208). On the other hand, the one-voter limit at issue in *Ray* is distinguishable because that limit was imposed in the process of applying for a ballot, not to assistance in marking a ballot. *See* 2008 WL 3457021, at *1 (explaining that after the voter receives the early voting ballot based on a witnessed application, the voter "may select an authorized person" to help mark the ballot).

Next, we consider the plain language of section 208 in light of the three-voter limit on delivery of a completed absentee ballot in Minn. Stat. § 203B.08, subd. 1. A voter can "designate an agent to deliver" a completed absentee ballot "to the county auditor or municipal clerk" or to deposit that ballot "in the mail." Minn. Stat. § 203B.08, subd. 1. That agent cannot "deliver or mail the return envelopes of . . . more than three voters in any election." *Id*.

The Democratic committees contend that section 208 preempts the three-voter limit in section 203B.08 on ballot delivery because the right to vote, they argue, extends to all phases of the voting process, including delivery of a marked ballot. The plain language of section 208 is not as broad as the Democratic committees assert. Section 208 is limited to voters who need "assistance to vote by reason of blindness, disability, or inability to read or write." 52 U.S.C. § 10508. Section 203B.08, in contrast, is a generally applicable

statute; it does not specifically address the delivery of completed ballots for voters with disabilities or language impairments, and it also provides multiple options for return of a completed ballot: by mail, in person, or by designating an agent who may mail or deliver the completed ballot in person. Minn. Stat. § 203B.08, subd. 1. Moreover, section 203B.08 directly addresses absentee voting; section 208 does not.[10] Accordingly, it is not clear that the three-voter limit on delivering a marked ballot stands as " 'an obstacle to the accomplishment' " of Congress's purpose and objectives in section 208. *In re Estate of Barg*, 752 N.W.2d at 64 (quoting *Hines v. Davidowitz*, 312 U.S. 52 (1941)). Nor have the Democratic committees cited to any decision that has so held.[11]

We recognize that Congress took a broad view of the assistance "to vote" when it comes to the needs of voters with language impairments or disabilities. Based on our

[10] It is clear, however, that section 208 does apply to absentee voters who need assistance marking their ballots. And Minnesota laws make clear that marking assistance is authorized by section 204C.15 to voters, whether they vote in person or absentee. *See* Minn. Stat. § 203B.03, subd. 1(a)(7) (2018) (prohibiting a person from providing assistance to an absentee voter, "except in the manner provided by section 204C.15, subdivision 1"); *see also Ray*, 2008 WL 3457021, at *6 (noting that the broad definition of "voting" in the Voting Rights Act "clearly encompasses voting by absentee ballot").

[11] The decision in *Democratic National Committee v. Hobbs*, 948 F.3d 989, 1041–42 (9th Cir. 2020) (en banc), declared an Arizona law that criminalized the use of a third party for ballot collection and delivery unconstitutional under section 2 of the Voting Rights Act and the Fifteenth Amendment to the Constitution. That decision did not address preemption generally or section 208 specifically. The decision in *Pierce v. Allegheny County Board of Elections*, addressed an equal protection claim related to voting rights. 324 F. Supp. 2d 684, 694–95 (W.D. Penn. 2003). The statute at issue did not impose a numeric limit on ballot collection. *Id.* at 691–92. A recent decision by the Montana Supreme Court, *Driscoll v. Stapleton*, No. DA 20-0295, 2020 WL 5793546, at *6 (Mont. Sept. 29, 2020), addressed a voting burden claim, rather than a preemption claim under section 208.

analysis, we conclude that the district court did not abuse its discretion in finding a likelihood of success that the three-voter limit on marking ballots, Minn. Stat. § 204C.15, subd. 1, is preempted by section 208 of the Voting Rights Act, 52 U.S.C. § 10508; but the district court did abuse its discretion in finding a likelihood of success that the three-voter limit on delivering marked ballots, Minn. Stat. § 203B.08, subd. 1, is preempted.

Nothing in our decision impacts the employer and union exclusions that are part of section 204C.15. Both exclusions are consistent with similar exclusions in section 208. *Compare* 52 U.S.C. § 10508, *with* Minn. Stat. § 204C.15, subd. 1. Nor does our holding address the candidate exclusion in section 204C.15. Other than relying on the *Thao* proceedings, the Democratic committees did not affirmatively assert that the candidate restriction is preempted by section 208; thus, we have not considered such a claim here. Further, defining the characteristics of permitted assistants is for the Legislature to address, so long as the restrictions are consistent with the objectives of section 208. *See, e.g.*, *Carlson v. Simon*, 888 N.W.2d 467, 470–71 (Minn. 2016) (recognizing, in the context of a First Amendment challenge to a state law that imposes requirements on write-in candidacies for president, that the State has "a legitimate interest in fairly and equitably regulating elections").[12]

[12] We conclude that the district court did not abuse its discretion in finding that the remaining factors for a temporary injunction—the relationship of the parties, the balance of harms, public policy considerations, and administrative burdens, *see Dahlberg Bros.*, 137 N.W.2d at 321–22—weigh in favor of the temporary injunction on the three-voter limit on assistance in marking a ballot, in Minn. Stat. § 204C.15, subd. 1. Given the time between the district court's injunction order and the general election, the accelerated review and consideration in this court, and the steps taken by the Secretary of State following the *Thao* consent decree and the district court's injunction order, we do not believe that the

II.

Because we have concluded that section 208 of the Voting Rights Act does not preempt the three-voter limit on delivering a marked ballot in Minn. Stat. § 203B.08, subd. 1, we must consider the Democratic committees' likelihood of success on their voting burden and free speech claims.[13] Applying the Supreme Court's "flexible" balancing test for constitutional challenges to voting regulations, *see Burdick v. Takushi*, 504 U.S. 428, 433–34 (1992) (rejecting strict scrutiny in favor of "a more flexible standard"); *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983) (explaining the "analytical process" of weighing the relevant factors), the district court concluded that the Democratic committees are likely to succeed on the merits of their claim that the three-voter limit in section 203B.08 impermissibly burdens the right to vote because that limit imposes a "severe" burden.

The Republican committees contend that the district court erred as a matter of law because the three-voter limit on delivery of marked ballots actually expands a voter's options, by allowing a voter to personally return a marked ballot, place a marked ballot in the mail, or select an individual to deliver the marked ballot with this last option subject to the three-voter limit. The three-voter delivery limit, the Republican committees contend,

injunction risks voter confusion or a loss of confidence in the integrity of the electoral process. *Cf. North Carolina v. League of Women Voters of N.C.*, 574 U.S. 927 (2014) (staying a preliminary injunction upheld on appeal less than 6 weeks before the general election).

[13] Our decision that section 208 preempts the three-voter limit in section 204C.15, subdivision 1, for assistance in marking ballots, makes it unnecessary to address the remaining constitutional challenges to that limit. *See State ex rel. Humphrey v. Philip Morris USA, Inc.*, 713 N.W.2d 350, 355 (Minn. 2006) ("[W]e do not reach constitutional issues if the matter can be resolved otherwise.").

is less onerous than identification requirements for voting, which the Supreme Court has held do not impose a severe burden on voting, *see Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 197–98 (2008) (plurality opinion) (stating that a photo identification requirement imposes "some burdens," but those burdens do "not qualify as a substantial burden on the right to vote").

The "right to vote is considered fundamental under *both* the U.S. Constitution and the Minnesota Constitution." *Kahn v. Griffin*, 701 N.W.2d 815, 830 (Minn. 2005). While a fundamental constitutional right is typically subject to a strict scrutiny standard of review, *see id*. at 832, the right to vote is not "absolute," and "States retain the power to regulate their own elections." *Burdick*, 504 U.S. at 433; *see also Storer v. Brown*, 415 U.S. 724, 730 (1974) (recognizing that there must be "substantial regulation" if elections are to be "fair and honest" with "some sort of order, rather than chaos"); *Kahn*, 701 N.W.2d at 832 (noting that it is "well-established" that states "may impose regulations that in some measure burden the right to vote"). Thus, the Supreme Court has adopted a flexible standard that weighs the character and magnitude of the claimed burden on voting against the State's interests and the extent to which those interests make the challenged regulation necessary. *Burdick*, 504 U.S. at 434; *see Crawford*, 553 U.S. at 191 (plurality opinion) (explaining that the Court has not adopted a "litmus test for measuring the severity of a burden" imposed on voting).

In *Crawford*, the Supreme Court concluded that Indiana's requirement for photo identification to vote in person did not impose a severe burden on voting because the challenges associated with securing that identification were "neither so serious nor so

frequent as to raise any question about the constitutionality" of the law. 553 U.S. at 197 (plurality opinion); *see also id.* at 205–06 (Scalia, J., concurring) (explaining that the different impacts of a generally applicable, nondiscriminatory voting regulation are not severe burdens); *Burdick*, 504 U.S. at 435–37 (concluding that the burden imposed by Hawaii's prohibition on write-in votes "is a very limited one" in light of alternative paths for a candidate to access the ballot); *Mays v. LaRose*, 951 F.3d 775, 791–92 (6th Cir. 2020) (upholding Ohio's deadline to request an absentee ballot 3 days before an election against a First Amendment challenge because that deadline is "nondiscriminatory" and though it may "eliminate opportunities to vote for electors who fail" to meet the deadline, the burden imposed by the law is "minimal").

Applying those principles to the three-voter limit on collection and delivery, we conclude that the Democratic committees are not likely to succeed on their voting burden claim. We begin with the plain language of the statute. The limit imposed by section 203B.08, subdivision 1, is a nondiscriminatory, generally applicable regulation. That is, the limit applies equally to every voter needing assistance in delivering a ballot.[14] *Crawford*, 553 U.S. at 205 (Scalia, J., concurring) (explaining that the Indiana law "draws no classifications" and does not exempt "voters who already have" identification). Further, the three-voter delivery limit does not stand as a prerequisite to voting—it is implemented

[14] The parties disagree over the need for a subgroup analysis in considering the burden imposed by a challenged regulation. It is not clear that the Supreme Court has used a subgroup analysis when the challenged law is nondiscriminatory and generally applicable, *cf. Crawford*, 553 U.S. at 198 (plurality opinion) (considering the burden in light of "voters who need" identification), such as the three-voter limit imposed by section 203B.08.

after the voter has obtained the ballot needed to vote absentee and after the voter has marked that ballot.

We recognize that there may be challenges for some voters in delivering a marked ballot, particularly for voters living outside metropolitan areas who may not have access to multiple voting locations and multiple delivery options. But the Supreme Court has said that burdens arising "from life's vagaries" do not translate to unconstitutional state regulations on voting, particularly when adequate alternatives are available to the voter. *Crawford*, 553 U.S. at 197–98 (plurality opinion). And voting invariably requires surmounting *some* burdens. *Id*. at 198 (stating that "the inconvenience of making a trip," collecting "the required documents, and posing for a photograph surely does not qualify as a substantial burden on the right to vote" or even "a significant increase over the usual burdens of voting"); *Burdick*, 504 U.S. at 433 ("Election laws will invariably impose some burden upon individual voters."). Certainly, the record before the district court establishes a *need* for assistance in delivering marked ballots; but it does not establish at this juncture, under a likelihood of success standard, that this need burdens the right to vote once the three-voter limit on delivery of marked ballots is reached. *See Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951–52 (7th Cir. 2007) (noting that while there are undoubtedly voters affected by Indiana's identification law, there was no evidence that the law would deter anyone from voting), *aff'd*, 553 U.S. 181 (2008).

Our conclusion is not inconsistent with the evidence that the Democratic committees presented of the burden faced by their get-out-the-vote efforts. The Democratic committees explained the financial burdens associated with securing enough volunteers to

provide assistance options and the corresponding reduction in resources for other campaign efforts if increased financial resources are devoted to delivery assistance. Choices about how to spend and deploy what are no doubt finite campaign resources do not make generally applicable regulations that provide multiple alternatives for delivery of a completed ballot (thereby assisting the voting process) a severe burden on voting. *See, e.g.*, *Dobrovolny v. Moore*, 126 F.3d 1111, 1113 (8th Cir. 1997) (acknowledging that a Nebraska law that "made it difficult . . . to plan" an initiative campaign and allocate resources did not implicate the First Amendment).

Further, we have said that the State has a compelling interest in orderly elections and procedures that preserve the integrity of the election process. *See Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 730 (Minn. 2003) (explaining the State's "compelling interest in preserving orderliness and integrity of the election process"); *Bell v. Gannaway*, 227 N.W.2d 797, 803 (Minn. 1975) (explaining that regulations for absentee voting "preserve the purity and integrity of elections"). While we have not addressed these interests in the context of the delivery-assistance limit, we see no reason that these interests are not relevant here.

Based on this analysis, we conclude that the district court abused its discretion in finding that a likelihood of success on the merits was shown on the claim that the three-voter limit on assistance in delivering a marked ballot violates Article I, Section 2 and Article VII, Section 1 of the Minnesota Constitution.

III.

Last, we consider the claim that the three-voter limit on delivering a marked ballot, in Minn. Stat. § 203B.08, subd. 1, violates the Democratic committees' constitutional rights to freedom of speech and association. The district court found that the Democratic committees had shown a likelihood of success on the merits of their claim that this limit violates their free speech and associational rights under the United States and Minnesota Constitutions. The court concluded that the three-voter limit impeded the Democratic committees' ability to engage in get-out-the-vote efforts and undertake political discussions with potential voters about the importance of voting and ways in which they could vote. Applying the exacting scrutiny standard from *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999), and *Meyer v. Grant*, 486 U.S. 414 (1988), the district court concluded that the impact of the statutory limit on delivery assistance diminishes the speech and associational rights of the Democratic committees "[b]y reducing the number of individuals who could potentially provide assistance to potential voters" and making it "more difficult and more expensive" for the Democratic committees to speak because of the need to recruit more people to provide ballot delivery assistance.

Both the United States and the Minnesota Constitutions provide for the freedom of speech.[15] U.S. Const. amend. 1; Minn. Const. art. I, § 3. The Democratic committees have a First Amendment right to encourage people to vote, to express the belief that voting is

[15] The Minnesota Constitution's right to free speech is coextensive with the First Amendment free speech right, *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 516 (Minn. 2012).

important, and to explain to others how to vote. *See, e.g.*, *Doe v. Reed*, 561 U.S. 186, 195 (2010) (stating that "the expression of a political view implicates a First Amendment right"). The Democratic committees also have a First Amendment right to associate with others "for the advancement of political beliefs." *Williams v. Rhodes*, 393 U.S. 23, 30 (1968).

At the same time, the United States Constitution provides that states may prescribe "[t]he Times, Places and Manner of holding Elections for Senators and Representatives," U.S. Const. art. I, § 4, cl. 1, and thus, "[s]tates retain the power to regulate their own elections," *Burdick v. Takushi*, 504 U.S. 428, 433 (1992). Many election-related laws impede on First Amendment rights to some degree. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (recognizing that each provision of election laws, "whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends").

As noted above with respect to the Democratic committees' voting-burden claim, we have used the *Anderson-Burdick* balancing test to determine if an election law impermissibly violates the First Amendment rights of voters or political parties. *See De La Fuente v. Simon*, 940 N.W.2d 477, 494 (Minn. 2020). The district court used a strict scrutiny test, drawn from the Supreme Court's decisions in *Buckley*, 525 U.S. at 192 n.12 (holding that a statute imposing restrictions on the procedures for circulating ballot initiative petitions involved communications with voters about political change and did not survive strict scrutiny), and *Meyer*, 486 U.S. at 420, 428 (holding that a statute prohibiting

payment to a person who circulates a ballot initiative petition restricts political expression and does not survive strict scrutiny). Asserting that the three-voter limit on delivering absentee ballots restricts constitutionally protected political speech, the Democratic committees urge us to apply the *Buckley-Meyer* strict scrutiny test. The Republican committees contend that collecting and delivering a marked ballot is non-expressive activity that is not subject to a strict scrutiny standard and does not violate First Amendment speech rights.

The *Anderson-Burdick* balancing test, rather than the *Buckley-Meyer* strict scrutiny test, is the appropriate standard to apply here. The challenged limit on the number of marked ballots that a person can collect and deliver governs the manner in which voting occurs, a setting distinct from the ballot initiative process considered in *Buckley* and *Meyer*. *See, e.g.*, *Priorities USA v. Nessel*, No. 19-13341, 2020 WL 2615766, at *11 (E.D. Mich. May 22, 2020) (applying *Buckley-Meyer* and distinguishing "cases involving the mere administrative process or the mechanics of the electoral process" from challenges to laws that regulate "discussions of whether to register to vote and . . . whether to vote absentee"); *Tenn. State Conf. of N.A.A.C.P. v. Hargett*, 420 F. Supp. 3d 683, 703–04 (M.D. Tenn. 2019) (applying *Buckley-Meyer* and noting that the case "involves more than merely the composition of a ballot or some other matter of election administration," because the change advocated for creates "new registered voters and, by extension, a change in the composition of the electorate"). *Anderson-Burdick*, in contrast, applies to challenges related to the manner in which voting occurs. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 344 (1995) (explaining that *Anderson-Burdick* applies when the Court

"review[s] election code provisions governing the voting process itself"); *Burdick*, 504 U.S. at 430 (applying this standard to Hawaii's prohibition on write-in voting).

Under this balancing test, we first consider the "character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments." *Anderson*, 460 U.S. at 789; *see Burdick*, 504 U.S. at 434 (considering "the extent to which a challenged regulation burdens First and Fourteenth Amendment rights"). We then identify and evaluate the State's "precise interests" that justify the burden. *Anderson*, 460 U.S. at 789. State regulations that impose a severe restriction "must be narrowly drawn to advance a state interest of compelling importance," *Burdick*, 504 U.S. at 434 (citation omitted) (internal quotation marks omitted). On the other hand, reasonable, nondiscriminatory restrictions are subject to "less exacting review," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997), and "the State's important regulatory interests are generally sufficient to justify the restrictions," *Burdick*, 504 U.S. at 434 (citation omitted) (internal quotation marks omitted).

The burden imposed on the Democratic committees' First Amendment rights by the three-voter limit on collecting and delivering marked ballots is not severe. The statute does not prohibit the Democratic committees, or anyone, from engaging in get-out-the-vote efforts, from having discussions with Minnesotans about the importance of voting or how a person can vote, or from providing assistance in collecting and delivering marked absentee ballots. In other words, even with a three-voter limit on ballot delivery, any member of the Democratic committees can discuss the importance of voting and ensuring that an absentee ballot is delivered with as many Minnesotans as the member can reach.

Indeed, the evidence that the Democratic committees submitted indicates that the burden the Democratic committees face is not from the three-voter limit on ballot delivery. It is financial: it costs money to secure the workforce needed to communicate these messages to as many voters as possible.

Because the three-voter limit on ballot delivery imposes, at most, only a modest burden on the Democratic committees' First Amendment rights, "then 'the State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions' on election procedures." *Minn. Voters All. v. City of Minneapolis*, 766 N.W.2d 683, 696 (Minn. 2009) (quoting *Anderson*, 460 U.S. at 788). We have already recognized the State's compelling interests in orderly elections and procedures that preserve the integrity of the election process, including in the context of absentee voting. *See Bell v. Gannaway*, 227 N.W.2d 797, 803 (Minn. 1975) (explaining that regulations for absentee voting "preserve the purity and integrity of elections"). The three-voter limit on ballot delivery promotes these interests. By limiting the number of ballots that one person can collect and deliver, section 203B.08 prevents one person or a group of people from tampering with or mis-delivering a large number of ballots.

Based on this analysis, we conclude that the district court abused its discretion in finding that the Democratic committees have shown a likelihood of success on the merits of their claim that the three-voter limit on ballot collection in Minn. Stat. § 203B.08, subd. 1, impermissibly burdens political speech and associational rights in violation of the First Amendment to the United States Constitution and Article I, Section 3 of the Minnesota Constitution.

CONCLUSION

For the foregoing reasons, the temporary injunction ordered by the district court is affirmed in part and reversed in part.

Affirmed in part, reversed in part.

THISSEN, J., took no part in the consideration or decision of this appeal.