

12(b)(6) because DRNC has failed to state a claim upon which relief can be granted. Plaintiff's challenge presents an argument of conflict preemption. In this context, "[c]onflict preemption occurs 'where [1] compliance with both federal and state regulations is a physical impossibility, or where [2] state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *New Ga. Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1301 (N.D. Ga. 2020) (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 98, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992)).

Here, the claim should be dismissed because many of the challenged statutes present no direct conflict to section 208. Moreover, the express language of section 208 requires that the voter is permitted "a person of the voter's choice", not the first person of their choosing without limit, and the section itself contemplates a reasonable limitation to prevent undue influence by persons who have authority over the voter. 52 U.S.C. 10508; *Ray v. Texas*, No. 2-06-CV-385 (TJW), 2008 U.S. Dist. LEXIS 59852, at *17-21 (E.D. Tex. Aug. 7, 2008); *see also Priorities United States v. Nessel*, 487 F. Supp. 3d 599, 619-20 (E.D. Mich. 2020), *rev. on other grounds*, *Priorities USA v. Nessel*, 860 F. App'x 419 (6th Cir. 2021) ("Section 208 provides that certain specified voters - i.e. those needing assistance due to blindness, disability, or inability to read or write - 'may be given assistance by a person of the voter's choice...' (Emphasis added). Section 208 does not say that a voter is entitled to assistance from *the* person of his or her choice or *any* person of his or her choice.").

To the extent any such conflict appears to exist, such minimal burdens are permitted because they are aligned with the purpose and intent of section 208: protecting vulnerable populations from manipulation and undue influence, rather than obstacles frustrating that purpose. *Ray*, 2008 U.S. Dist. LEXIS 59852, at *18-19 (In considering a section 208 challenge to state

limits on who may assist a voter, district court found that “[t]he Supreme Court allows the states to regulate elections, provided that those restrictions are reasonable and non-discriminatory.”); *Qualkinbush v. Skubisz*, 357 Ill. App. 3d 594, 610-12, 826 N.E.2d 1181, 1196-97 (App. Ct. Ill. 2004) (“[S]tates may impose restrictions on those individuals who may return a disabled voter’s absentee ballot, and that such restrictions may be above and beyond those set forth in the Voting Rights Act.”); *see also Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 233-34 (M.D.N.C. 2020) (“The court is also mindful that the legislative history for what would become Section 208 reads, ‘State provisions would be preempted only to the extent that they unduly burden the right recognized in this section, with that determination being a practical one dependent upon facts.’”).

For these reasons, Plaintiff’s Complaint should be dismissed.

Statement of Facts

A. Plaintiff’s Allegations:

Presenting the facts in the light most favorable to Plaintiff:

DRNC is a non-profit organization that advocates for the rights of individuals with disabilities and is the sole Plaintiff in this matter. *Id.*, ¶¶ 6-7. DRNC asserts that it is the P&A system for North Carolina under the Developmental Disabilities Assistance and Bills of Rights Act, 42 U.S.C. § 15041, *et seq.*, the Protection and Advocacy for Individuals with Mental Illness Act of 1986, 42 U.S.C. § 10801, *et seq.*, and the Protection and Advocacy of Individual Rights Act, 29 U.S.C. § 794e, *et seq.* *Id.*, ¶ 6.

In the Complaint, Plaintiff asserts a single cause of action under Section 208 of the VRA challenging six distinct provisions of North Carolina law. Section 208 reads in full:

Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter’s choice, other than the voter’s employer or agent

of that employer or officer or agent of the voter's union.

52 U.S.C.S. § 10508.

DRNC first complains that sections N.C.G.S. §§ 163-230.2(e) and -230.3 violate section 208 because they place limits on who may assist a voter in requesting an absentee ballot. [D.E. 1, ¶ 19-20]. Specifically, DRNC cites subsection 163-230.2(e) because it states that a request for an absentee ballot cannot be completed or signed by anyone other than the voter, a near relative, or a legal guardian. *Id.* DRNC claims the same limitations found in subsection (e) apply to requesting an online ballot through section 163-230.3. [D.E. 1, ¶¶ 19-20].

Next, DRNC specifically alleges that subsections 163-226.3(a)(4) and -231(b)(1), establishing the process by which an absentee ballot is marked and returned to the county board, violate the VRA because it does not permit the owner, manager, director, or staff of a hospital, clinic, nursing home or rest home ("medical facility personnel") from assisting a voter who is a residing patient of that same medical facility. [D.E. 1, ¶¶ 21-23, 25-30]. This allegation generally presumes voters exist for whom medical facility personnel are their preferred choice of assistant. *Id.*, ¶¶ 30, 33.

DRNC next alleges that subsection 163-226.3(a)(6) violates the VRA because it does not permit another person to assist in marking the voter's ballot, to be in the presence of the voter while marking the ballot, or to observe the voter marking the ballot. *Id.*, ¶ 24.

Finally, DRNC cites section 163-230.1 (governing simultaneous issuance of absentee ballots with the voter's application"), but provides no explanation of how it violates the VRA. *Id.*, ¶ 27.

B. Statutes at Issue and Relevant State Board Policies:

Section 163-230.2 governs how a voter may request an absentee ballot. Subsection (a) requires that the State Board make blank request forms available at its offices, online, in each

county board office, and that it may be reproduced. N.C.G.S. § 163-230.2(a). Voters may also call the State Board or county board to request the form via telephone and the elections staff can send the form to the voter by mail, e-mail, or fax. *Id.* Subsection (a) further provides that the request for an absentee ballot must be made on the form created by the State Board, signed by the voter, near relative or legal guardian, and the statute outlines the information that must be contained therein. *Id.* Subsections (c) and (e) require that the request form be returned by the voter, the voters' near relative or legal guardian, a member of a multipartisan assistance team ("MAT") appointed by a county board to assist absentee voters in medical facilities, the United States Postal Service, or a designated delivery service as recognized by the Internal Revenue Service. *Id.* Subsection (e) permits a voter to receive assistance from their near relative or legal guardian or a MAT member in completing the absentee request form. *Id.* However, as stated above, subsection (e1) provides a blanket exception mirrored upon section 208 of the VRA which permits any voter who, due to blindness, disability, or inability to read or write, is permitted to seek the assistance of any other person if their near relative or legal guardian is not available to assist, with the exception of those prohibited by section 163-226.3(a)(4). *Id.*

Section 163-230.3 requires that the State Board provide an entirely online electronic version of the form available on the State Board's website, which allows a qualified voter to complete this same absentee ballot request process online. *Id.* § 163-230.3. This section expressly states that all other provisions in section 163-230.2 shall apply, which allows the VRA exception found in subsection (e1) to carry over to this online application. *Id.* § 163-230.2(a).

Section 163-226.3 delineates what type of assistance is available to voters, and establishes certain acts in violation thereof as felonies. When filling out the absentee ballot, a voter may seek assistance from a near relative or the voter's legal guardian. *Id.* § 163-226.3(a)(1). However, if a

near relative or guardian is not available, “the voter may seek the assistance of some other person to give assistance.” *Id.* Subsections (a)(2) and (a)(3) deal with one-stop early voting procedures. *Id.* §§ 163-226(a)(2), (3). Subsection (a)(4) expands those who can assist to include county board of elections workers known as MATs, and if the MAT does not respond within 7 days, the voter is free to seek the assistance of any other person. *Id.* § 163-226.3(a)(4). When combined, subsections (a)(1) and (a)(4) allow any voter requiring assistance to seek the assistance of a near relative, legal guardian, MATs, or any other person. However, North Carolina law specifically prohibits assistance by medical facility owners, staff, and providers when the voter is a patient of the same medical facility. *Id.* Finally, when a voter does not require assistance as contemplated by subsections (a)(1) and (a)(4), subsection (a)(6) prohibits the voter from allowing another person to mark the voter’s absentee ballot, to be in the voter’s presence while voting, or to observe the voter mark the ballot. *Id.* § 163-226.3(a)(6).

Section 163-231 sets forth the procedures for marking an absentee ballot and transmitting it back to the county board of elections. Subsection (a), not challenged by Plaintiff, sets forth the procedures for marking the ballot, the ballot return envelope, and preparing it for return to the county board. *Id.* § 163-231(a). Subsection (b), which Plaintiff challenges, bars the collection and transmission of completed absentee ballots by anyone other than the voter, a near relative, legal guardian, by mail, or by commercial courier service. *Id.* § 163-231(b)(1).

Section 163-230.1 sets forth the deadlines for requesting an absentee ballot. Specifically, the ballot must be requested no later than 5:00 P.M. on the Tuesday before the election. *Id.*, 163-230.1(a). Subsection (b) also creates an exception to this deadline under which any person suffering from a sickness or other physical disability, that prevents them from voting in person, may request an absentee ballot in person, or through a near relative or legal guardian, up to 5:00

P.M. the day before the election. *Id.* § 163-230.1(b). The county boards are instructed to process the application immediately and must then personally deliver to the voter their absentee ballot and return envelope. *Id.* This late delivery and personal service is extended only to sick and disabled voters. *Id.*

The State Board also recently implemented an entirely online accessible electronic portal to allow visually impaired voters to vote absentee privately and independently without assistance. *See Taliaferro v. N.C. State Bd. of Elections*, No. 5:20-cv-411, Dkt. No. 63, 2021 U.S. Dist. LEXIS 112281 (E.D.N.C. June 15, 2021).¹ As a result, any visually impaired voter can now request an absentee ballot online and will then be provided access to the online Democracy Live portal to vote using an accessible audible screen reader system from request, to voting, to submission of their ballot. *Id.*, p. *3.

In addition to the Democracy Live system, the State Board provides further instructions for disabled voters to seek assistance in voting on its website. See the State Board’s webpage: “Help for Voters with Disabilities”, <https://www.ncsbe.gov/voting/help-voters-disabilities>, last visited October 26, 2021.² Beyond the accommodations and assistance described on that webpage, it also links to the Accessibility Policy for Alternative Formats which invites any disabled person to request an accommodation to help them vote, including provisions that permit requesting

¹ As a ruling from this Court involving substantially the same parties, this Court may take judicial notice of this ruling and its implementation because it is “a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201(b); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007).

² This Court may take judicial notice of the State Board’s policies, records, and communications as they are official government records that are publicly available on the State Board website. *Fauconier v. Clarke*, 652 F. App’x. 217, 220 (4th Cir. 2016); *Philips v. Pitt Cnty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir.2009) (courts “may properly take judicial notice of matters of public record”); *Hall v. Virginia*, 385 F.3d 421, 424 & n.3 (4th Cir. 2004); *see also* Fed. R. Evid. 201.

alternative formats, such as Braille, large print, audio, and accessible electronic formats that provide effective communication for the absentee voting process. See the State Board’s webpage: “North Carolina State Board of Elections Accessibility Policy for Alternative Formats, <https://www.ncsbe.gov/voting/help-voters-disabilities/north-carolina-state-board-elections-accessibility-policy-alternative-formats>, last visited October 27, 2021; see also *Taliaferro*, 2021 U.S. Dist. LEXIS 112281, at *6-7, ¶ 6. Thus, if the Democracy Live system is not effective for the voter, they are permitted to request an alternative format that does meet their needs in compliance with the Americans with Disabilities Act. *Id.*

Legal Argument

I. PLAINTIFF’S CLAIM SHOULD BE DISMISSED BECAUSE IT FAILS TO STATE A CLAIM.

Plaintiff’s claims should be dismissed for failure to state a claim pursuant to Rule 12(b)(6). To survive a Rule 12(b)(6) motion, “a complaint must contain sufficient factual matter . . . ‘to state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007)). “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Ashcroft*, 556 U.S. at 678 (citing *Twombly*, 550 U.S. at 555, 570). “A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement.” *Id.* (quoting *Twombly*, 550 U.S. at 555, 557) (internal brackets and quotation marks omitted). The Fourth Circuit has held that courts are not required “to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002).

In evaluating a Rule 12(b)(6) motion, the Court considers the allegations in the Complaint and any materials incorporated therein, as well any document submitted by the movant that is

“integral to the complaint and there is no dispute about the document’s authenticity.” *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016). The Court may also take judicial notice of public records when considering a Rule 12(b)(6) motion. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d 179 (2007) (recognizing that a court may consider during Rule 12(b)(6) review any “documents incorporated into the complaint by reference, and matters of which a court may take judicial notice”); *Hall v. Virginia*, 385 F.3d 421, 424 & n.3 (4th Cir. 2004) (taking judicial notice of information publicly available on official government website); *see also* Fed. R. Evid. 201.

This claim is subject to dismissal for failure to state a claim upon which relief can be granted because preemption does not occur under these circumstances. Several of the sections challenged by DRNC do not conflict in any way with the VRA, and of those remaining sections, any minimal conflict that is imposed is intended to serve the same purposes intended by Congress when it enacted section 208.

Any analysis of preemption must start with “the general presumption that Congress did not intend to preempt state law.” *Columbia Venture, LLC v. Dewberry & Davis, LLC*, 604 F.3d 824, 830 (4th Cir. 2010); *see also Priorities United States*, 487 F. Supp. 3d at 618, *rev. on other grounds, Priorities USA v. Nessel*, 860 F. App’x 419 (6th Cir. 2021) (“[T]he assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.”). Preemption may be express or implied, whether explicitly stated in the statute itself or implied within the structure and purpose of the statute. *Gade*, 505 U.S. at 98.

Where there is no express preemptive language, the Court must look to whether there is implied preemption. The Supreme Court has recognized two forms of implied preemption: field

preemption and conflict preemption. *Id.* Field preemption occurs when the scheme of federal regulation is “so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it, is not present in the context of election law.” *Id.* (quoting *Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta*, 458 U.S. 141, 153, 102 S. Ct. 3014, 3022 (1982)). Conflict preemption exists “[1] where compliance with both federal and state regulations is a physical impossibility, or [2] where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Id.* (internal citations and quotations omitted).

The latter, also known as obstacle preemption, “requires the court independently to consider national interests and their putative conflict with state interests. . . . [P]reemption under [an obstacle preemption] theory is more an exercise of policy choices by a court than strict statutory construction. *Equal Rights Ctr. v. Niles Bolton Assocs.*, 602 F.3d 597, 601 (4th Cir. 2010) (quoting *Abbot v. Am. Cyanamid Co.*, 844 F.2d 1108, 1113 (4th Cir. 1988)).

Here, section 208 contains no express preemptive language, nor has Congress legislated in the area of election law so pervasively as to preempt the field. *See New Ga. Project*, 484 F. Supp. 3d at 1301; and *Ark. United v. Thurston*, No. 5:20-CV-5193, 2020 U.S. Dist. LEXIS 207145, at *7-8 (W.D. Ark. Nov. 3, 2020) (Both finding that a preemption argument involving section 208 presents a question of conflict preemption).

In fact Congress anticipated that states would impose restrictions beyond those expressly stated in section 208, and that such restrictions could coexist with the VRA:

The committee recognizes the legitimate right of any state to establish necessary election procedures, subject to the overriding principle that such procedures shall be designed to *protect the rights of voters*. State provisions would be preempted only to the extent that they *unduly burden* the right recognized in this section, with that determination being a practical one dependent upon the facts.”

Qualkinbush, 357 Ill. App. 3d at 611 (emphasis in original) (quoting Senate Committee, S. Rep. 97-417, 1982 U.S.C.C.A.N. 177, 241.); see also *Democracy N.C.*, 476 F. Supp. 3d at 233-34 (M.D.N.C. 2020) (“The court is also mindful that the legislative history for what would become Section 208 reads, ‘State provisions would be preempted only to the extent that they unduly burden the right recognized in this section, with that determination being a practical one dependent upon facts.’”). Accordingly, this Court’s analysis should not end if it finds a potential conflict. Rather, the court’s goal “in any pre-emption case is to determine whether state regulation is consistent with the structure and purpose of the statute as a whole. Looking to ‘the provisions of the whole law, and to its object and policy.’” *Id.* (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987)).

Several courts have carried out a similar analysis to consider whether a state law potentially at conflict with section 208 is justified by state interests. *Ray*, 2008 U.S. Dist. LEXIS 59852, at *18-19 (In considering a section 208 challenge, district court found that “[t]he Supreme Court allows the states to regulate elections, provided that those restrictions are reasonable and non-discriminatory.”); *Qualkinbush*, 357 Ill. App. 3d at 610-12 (“[S]tates may impose restrictions on those individuals who may return a disabled voter’s absentee ballot, and that such restrictions may be above and beyond those set forth in the Voting Rights Act.”).

Thus, in keeping with preemption precedent and the intent of Congress, it is appropriate for any analysis to consider whether a direct conflict exists between the two laws, or whether if any such conflict exists, it shares the same purposes and objectives underlying section 208 or stands as an obstacle to that purpose. *Gade*, 505 U.S. at 98.

A. The Challenged Statutes Do Not Conflict with Section 208.

As a threshold matter, DRNC seeks to have the Court interpret section 208 broadly to require that disabled persons must be permitted to use **the** specific assistant of their choice without limitation. [D.E. 1, ¶¶ 30, 34; *Id.*, p. 9, ¶ 2]. This is contradicted by the express language of section 208 that states that such voters “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.S. § 10508 (emphasis added). Thus, section 208 requires that the voter is permitted **a** person of their choosing, not the first person of their choosing without limitation, and the section itself contemplates a reasonable limitation to prevent undue influence by persons who have authority over the voter. *Id.*

Moreover, DRNC’s overly broad interpretation of the statute has been considered and rejected by courts reviewing the same argument. *Ray*, 2008 U.S. Dist. LEXIS 59852, at *17-21; *see also Priorities United States*, 487 F. Supp. 3d at 619-20, *rev. on other grounds, Priorities USA v. Nessel*, 860 F. App’x 419 (6th Cir. 2021) (“Section 208 provides that certain specified voters - i.e. those needing assistance due to blindness, disability, or inability to read or write – ‘may be given assistance by *a* person of the voter’s choice...’ (Emphasis added). Section 208 does not say that a voter is entitled to assistance from *the* person of his or her choice or *any* person of his or her choice.”).

Finally, the analysis of the language of section 208, should be considered within the context of DRNC’s proposed relief. The Complaint seeks an “injunction prohibiting Defendants from limiting the choice of assistants available to voters with disabilities, or otherwise infringing the rights of voters with disabilities under Section 208 of the Voting Rights Act.” [D.E. 1, p. 9, ¶2]. DRNC’s overly broad interpretation, as reflected in the requested relief, demonstrates that DRNC

seeks to invalidate all limits, not just those related to medical facility personnel. This would require the state to permit any voter under section 208 to choose any person without limitation, including political party officials, campaign officials, elective office holders, or even candidates for office (“political officials”). *See, e.g.*, N.C.G.S. § 163-226.3(a)(4). Such an unlimited reading of section 208 should be rejected in favor of an interpretation that reflects Congress’ acknowledged limitations on preemption and the established case law affirming that certain limits are permissible, such as section 208’s own limits on employers and unions, so long as they are supported by the same purpose and intent behind section 208 itself. See Part I-B below regarding further discussion about legislative interests.

With this understanding of the requirements of section 208, reviewing each step in the absentee voting process in turn reveals that three of the challenged sections—163-226.3(a)(6), -230.2(e), and -230.3—create no conflict with Section 208. Two sections, 163-226.3(a)(4) and -231(b)(1), present only a minor burden that tracks the same purposes and objectives which motivated Congress to pass section 208. The last section, 163-230.1, presents a clear failure to state a claim for preemption because the Complaint contains no allegation explaining how it conflicts with section 208. For that reason alone, DRNC’s challenge to section 163-230.1 should be dismissed.

1. Requesting an Absentee Ballot.

DRNC claims that subsection 163-230.2(e) violates section 208 because it states that a request for an absentee cannot be completed or signed by anyone other than the voter, near relative, or a legal guardian. [D.E. 1, ¶ 19-20]. Plaintiff’s allegation is fatally flawed because any restriction it is challenging that applies to all voters in subsection (e), fails to acknowledge that subsection (e1), which immediately follows it, provides an express exception for section 208 voters:

If a voter is in need of assistance completing the written request form due to blindness, disability, or inability to read or write and there is not a near relative or legal guardian available to assist that voter, the voter may request some other person to give assistance, notwithstanding any other provision of this section.

N.C.G.S. § 163-230.2(e1). By reading this section it is clear that it mirrors section 208, but also that it supersedes the other provisions in section 163-230.2, including the challenged subsection (e). It should be noted that this section does not supersede section 163-226.3(a)(4), which prohibits assistance by political officials or medical facility personnel if the voter was a resident of the same medical facility. Thus, any limited restriction that may apply in the application process comes from section 163-226(a)(4), not section 163-230.2. For that reason, DRNC's challenge to subsection 163-230.2(e) must fail because it places no restriction on who may assist voters who are disabled, blind or unable to read or write in utilizing an assistant in requesting, filling out, and returning an absentee ballot request form.

Next, DRNC claims that the same provision found in subsection 163-230.2(e) applies to requesting an online ballot in section 163-230.3 (D.E. 1, ¶¶ 19-20). This allegation suffers from the same fatal flaw because a close reading of subsection 163-230.3(a) reveals that the same VRA language found in subsection 163-230.2(e1) carries over into this challenged statute:

- (a) Notwithstanding G.S. 163-230.1 and G.S. 163-230.2, a qualified voter who is eligible to vote by absentee ballot under G.S. 163-226, or that voter's near relative or verifiable legal guardian, may submit a request for absentee ballots online using the procedures set forth in this section in lieu of the completed written request on a form established by the State Board. **All other provisions in G.S. 163-230.1 and G.S. 163-230.2 shall apply.**

N.C.G.S. § 163-230.3(a) (emphasis added). As all other provisions from section 163-230.2 carry over to section 163-230.3(a), including subsection (e1), section 163-230.3(a) does not place any restriction on voters who are disabled, blind or unable to read or write in utilizing an assistant in requesting, filling out, and returning an electronic absentee ballot request form. To the extent any

restrictions in choice are imposed on this process, those arise in section 163-226.3(a)(4), not section 163-230.3. For this reason, DRNC's challenge to section 163-230.3 must also fail.

Because the two sections challenged do not present meaningful restrictions on section 208 voters, Plaintiff has failed to state a valid preemption claim upon which relief can be granted with respect to these challenged statutes or North Carolina's absentee request process.

2. Marking an Absentee Ballot.

DRNC next challenges subsection 163-226.3(a)(4) as violating the VRA because it prohibits the owner, manager, director, or staff of a medical facility from assisting a voter who is a patient in that same medical facility with the absentee voting process. [D.E. 1, ¶¶ 21-23, 25-30]. This allegation presumes that a voter wants their medical facility personnel to act as their assistant. *Id.*, ¶¶ 30, 33.

Subsection (a)(4) does outline the policy of the State that forbids owners and staff of medical facilities to assist voters because they present a risk of undue influence if they are permitted to assist their own patients. N.C.G.S. § 163-226.3(a)(4). But subsection (a)(4) also ameliorates this inconvenience, by allowing the voter to choose any other person if their near relative, legal guardian, or a MAT is not available (seven days after requesting assistance), so long as it is not medical facility personnel or political officials. *Id.* DRNC alleges in its Complaint that it has been forced "to address concerns from facilities and individuals where voters' ability to cast absentee ballots was frustrated by unavailability or inadequacy of MATs," but this subsection provides that if that situation were to occur, then the voter is free to select any other person as described above, even the members of DRNC, to provide assistance when needed. [D.E. 1, ¶ 37(g)].

Nonetheless, it is undisputed that North Carolina law specifically prohibits medical facility personnel from assisting patients within the same medical facility as Plaintiff alleges. State Board Defendants rely on the arguments contained in Part I-B below to explain why this limitation does not present a conflict with section 208.

DRNC next alleges that subsection 163-226.3(a)(6) violates the VRA. *Id.*, ¶ 24. This full allegation by Plaintiff reads:

24. A voter with a disability living in a congregate setting is prohibited by state law to permit another person to assist the voter in marking that voter's absentee ballot, to be in the voter's presence when a voter votes an absentee ballot, or to observe the voter mark that voter's absentee ballot.

N.C. Gen. Stat. § 163-226.3(a)(6).

Id. Putting aside for the moment that this provision exists to protect the secrecy of the voter's ballot, this quotation omits the qualifying prefatory language that precedes it, which reads: "Except as provided in subsections (1), (2), (3) and (4) of this section, G.S. 163-231(a), and G.S. 163-227.2(e), for any voter to permit another person to assist ..." N.C.G.S. § 163-226.3(a)(6). The omitted language establishes that subsection (a)(6) does not apply to voters who require assistance at all. The cited subsections (a)(1) and (a)(4) establish that any voter requiring assistance may obtain assistance from a near relative, legal guardian, MAT, or any other person, so long as that person is not the medical facility personnel overseeing the patient or a political official. *Id.* §§ 163-226(a)(1), (a)(4). Thus, there are few restrictions placed on any voter who requires assistance by subsection 163-226(a)(6), such that DRNC cannot sustain a claim for preemption with respect to this section.³

³ Even if subsection (a)(6) was intended to restrict how assistance is provided in order to protect the secrecy of the voter's ballot, such restrictions are permitted under Section 208. *Nelson v. Miller*, 950 F. Supp. 201, 1996 U.S. Dist. LEXIS 19061 (W.D. Mich. 1996), *aff'd*, 170 F.3d 641,

By considering the entirety of subsection (a), it is clear that this section does not prohibit a voter from gaining assistance except from those whom North Carolina policy makers have determined could exert undue influence over them. *Id.*

3. Returning an Absentee Ballot to the County Board.

Finally, DRNC challenges subsection 163-231(b)(1), which governs transmittal of absentee ballots back to the county board, and which forbids ballot collection by requiring delivery by mail or commercial courier service, or hand delivery by the voter or voter's near relative or legal guardian. N.C.G.S. § 163-231(b)(1). DRNC claims this violates section 208 because “[a] voter with a disability living in a congregate setting also is barred from requesting help with mailing a ballot from an individual affiliated with the facility in which the voter lives even if the ballot envelope is sealed.” [D.E. 1, ¶ 25].

Section 163-231 sets forth the procedures for marking an absentee ballot and how to transmit it back to the county board of elections. Subsection (b)(1) sets forth the State's policy barring the collection and transmission of completed absentee ballots by anyone other than the voter, a near relative, legal guardian, by mail, or by commercial courier service. *Id.* § 163-231(b)(1). The only other court that appears to have considered this question found that such limits do not conflict with section 208. *Qualkinbush*, 357 Ill. App. 3d at 610-12 (“[S]tates may impose restrictions on those individuals who may return a disabled voter's absentee ballot, and that such restrictions may be above and beyond those set forth in the Voting Rights Act.”);

1999 FED App. 0112P, 1999 U.S. App. LEXIS 5161 (6th Cir. 1999) (Blind voters have no viable cause of action against state, where state currently allows blind voters to designate person to assist them in casting ballot, even though state statute also provides that “no rule shall be made which provides for reducing secrecy of ballot,” because it does not appear that Congress intended that former 42 U.S.C. §§ 1973aa-6 and 1973ee-1 be read so broadly as to require states with statutory provisions regarding secret ballot to provide blind voters with voting privacy free from third-party assistance.)

Again, it is undisputed that North Carolina law specifically prohibits medical facility personnel from assisting patients within the same medical facility in voting. State Board Defendants rely on the arguments contained in Part I-B immediately below to explain why this limitation does not present a conflict with section 208.

B. North Carolina, through the Challenged Statutes, and Congress, through Section 208, Share the Same Interests, Such that No Obstacle Exists.

North Carolina has important regulatory interests in eliminating the potential for manipulation and undue influence of voters, especially certain voters who may require further assistance, like voters who are disabled, blind, or unable to read and write. This is the same concern that motivated Congress when it passed section 208:

[B]ecause of their need for assistance, members of these groups are more susceptible than the ordinary voter to having their vote unduly influenced or manipulated. . . . The committee is concerned that some people in this situation do in fact elect to forfeit their right to vote. Others may have their actual preference overborne by the influence of those assisting them or be misled into voting for someone other than the candidate of their choice.

Qualkinbush, 357 Ill. App. 3d at 610-11 (quoting S. Rep. 97-417, 1982 U.S.C.C.A.N. at 240-41) (internal citations omitted). “The committee concluded that the only way ‘to avoid possible intimidation or manipulation of the voter’ was to allow the voter to choose whom they desire to assist them.” *Id.* (quoting S. Rep. 97-417, 1982 U.S.C.C.A.N. at 241.) As noted by the district court in *Ray v. Texas*, “The legislative history evidences an intent to allow the voter to choose a person whom the voter trusts to provide assistance. It does not preclude all efforts by the State to regulate elections by limiting the available choices to certain individuals.” *Ray*, 2008 U.S. Dist. LEXIS 59852, at *19. This is the case here: North Carolina chose to place minimal limits on absentee voting in order to avoid undue influence on voters.

This interest is well-supported. In 2005, the Commission on Federal Elections Reform, a bipartisan commission chaired by former President Jimmy Carter and former Secretary of State James Baker, cautioned that “Absentee balloting is vulnerable to abuse in several ways: . . . Citizens who vote at home, at nursing homes, at the workplace, or in church are more susceptible to pressure, overt and subtle, or to intimidation.” Comm’n on Fed. Elections Reform, *Building Confidence in U.S. Elections* 46 (2005). The Commission went on to explain that states should “reduce the risks of fraud and abuse in absentee voting by prohibiting ‘third-party’ organizations, candidates, and political party activists from handling absentee ballots.” *Id.* As part of its formal recommendation, the Commission stated: “States and local jurisdictions should prohibit a person from handling absentee ballots other than the voter, an acknowledged family member, the U.S. Postal Service or other legitimate shipper, or elections officials.” *Id.* at 47.

Section 208’s limits, and North Carolina’s limits, on assistance are in line with the Commission’s recommendations. Section 208 is concerned with undue influence through workplace relationships. North Carolina’s challenged statutes are concerned with undue influence through patient-provider relationships and by political officials. This moderate limit is part of a larger statutory scheme and works in concert with other election integrity and public confidence provisions in the state’s absentee voting laws, including those requiring voters to verify personal information, requiring certifications under penalty of perjury, and prohibiting falsifications of information on the ballots. N.C.G.S. §§ 163-274, -275.

The reasons for these restrictions, and the ban on ballot collection found in section 163-230.1(b)(1), are not theoretical. In the 2018 general election for North Carolina’s Ninth Congressional District, a political activist hired by a candidate engaged in a coordinated absentee ballot fraud scheme in which he paid employees to pre-fill absentee request forms (sometimes

through forgery) and collect absentee ballots from voters, and organized employees to fill in incomplete, unsealed ballots in favor of particular candidates. This scheme resulted in the results of the election for that contest being invalidated, requiring a new election the following year.⁴

Applying these interests to obstacle preemption, the ultimate question is whether the purposes of the statutes, the underlying national interests, conflict with the state interest, which is a question of policy choices rather than statutory construction. *Equal Rights Ctr.*, 602 F.3d at 601. Here, there is no conflict under obstacle preemption because the intended purpose of Congress in enacting section 208 and the legislature of North Carolina in enacting the challenged statutes are the same: protecting vulnerable voters from manipulation and undue influence during the voting process. Section 208 accomplishes this by prohibiting assistance by officers and agents of employers and unions. North Carolina does this by prohibiting assistance by medical facility personnel and political officials. The statutes are complementary; not in conflict.

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⁴ For the full Order issued by the State Board regarding this incident, see https://dl.ncsbe.gov/State_Board_Meeting_Docs/Congressional_District_9_Portal/Order_03132019.pdf.

Conclusion

For the reasons above, the State Board Defendants respectfully request that Plaintiff's Complaint be dismissed with prejudice.

This the 1st day of November, 2021.

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