

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION
Civil Case No. 5:21-cv-361-BO

DISABILITY RIGHTS NORTH)
CAROLINA,)
))
Plaintiff,)
))
v.)
))
NORTH CAROLINA STATE BOARD OF)
ELECTIONS, KAREN BRINSON BELL, in)
her official capacity as Executive Director of)
the NCSBOE, DAMON CIRCOSTA, in his)
official capacity as Chair of the NCSBOE,)
STELLA ANDERSON, in her official)
capacity as Secretary of the NCSBOE, JEFF)
CARMON III, in his official capacity as)
Member of the NCSBOE, STACY EGGERS)
IV, in his official capacity as Member of the)
NCSBOE, and TOMMY TUCKER, in his)
official capacity as Member of the NCSBOE,)
))
Defendants.)

**PLAINTIFF’S MEMORANDUM OF
LAW IN OPPOSITION TO
DEFENDANTS’
MOTION TO DISMISS**

Plaintiff Disability Rights North Carolina, by and through counsel, hereby responds to Defendants’ Motion to Dismiss [D.E. 18].

NATURE OF THE CASE

Plaintiff Disability Rights North Carolina (“DRNC”), filed this action on September 9, 2021. [D.E. 1.] DRNC alleges that several provisions of North Carolina law regarding absentee voting contravene Section 208 of the federal Voting Rights Act. Defendants filed a Motion to Dismiss on November 1, 2021. [D.E. 17, 18.] Defendants contend that North Carolina law does not conflict with, and is not preempted by, federal law and, alternatively, federal law permits North Carolina to burden a voter’s right to an assistant of their choosing.

STATEMENT OF FACTS

The following provisions of North Carolina law limit the rights of voters with disabilities in obtaining assistance with voting: N.C. Gen. Stat. §§ 163-230.1, 230.2(e), and 230.3 limit who can help a voter request an absentee ballot; N.C. Gen. Stat. §§ 163-226.3(a)(4) and (a)(6) prohibit individuals affiliated with a congregate care facility from providing – and voters living in that facility receiving – assistance with voting; and N.C. Gen. Stat. § 163-231(b)(1) prohibits a voter from getting assistance with mailing a ballot from the individual of their choice. (D.E. 1 [Complaint] ¶¶ 19-21, 24-25, 27.)

ARGUMENT

Federal law unambiguously provides voters with disabilities the right to decide for themselves who to ask for help in voting, if they need it:

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

52 U.S.C. § 10508 (“Section 208”). The scope of “voting” encompassed by Section 208 includes all relevant aspects of absentee voting:

The terms “vote” or “voting” shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this Act, 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 with respect to candidates for public or party office and propositions for which votes are received in an election.

52 U.S.C. § 10310. *See also, Democracy N.C. v. N.C. State Bd. Of Elections*, 476 F. Supp. 3d 158, 234-35 (M.D.N.C. 2020) (holding that provisions of North Carolina election law relating to various aspects of the absentee voting process are subject to Voting Rights Act).

As Defendants note [D.E. 18, p. 10], conflict preemption applies where compliance with

both federal and state law is not possible, or “where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Gade v. Nat’l. Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98, 112 S. Ct. 2374, 2383 (1992) (internal quotation marks and citations omitted). As detailed below, both aspects of conflict are present with regard to the above challenged provisions of state law.

Defendants contend that they are entitled to a presumption against the preemption of state law. [D.E. 18, p. 9.] In the voting context, the Supreme Court has declined to employ such a presumption. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 13, 133 S. Ct. 2247, 2256 (2013) (rejecting presumption against preemption in the context of Congress’ regulation of elections). Even where applicable, “in practice it is difficult to understand what a presumption in conflict preemption cases amounts to, as we are surely not requiring Congress to state expressly that a given state law is preempted using some formula or magic words.” *Fla. State Conf. of the NAACP v. Browning*, 522 F.3d 1153, 1168 (11th Cir. 2008).

Section 208 provides an unambiguous rule, the infringement of which is not permitted under the plain language of the statute. It places the ability to combat interference or manipulation within the power of the voter with a disability. The challenged provisions of North Carolina law directly contravene Section 208 and impermissibly restrict the right to decide who can provide assistance.

I. The Challenged Statutes Plainly Contravene Section 208.

Plaintiff challenges several provisions of North Carolina law regarding absentee voting that contravene Section 208.

First, N.C. Gen. Stat. §§ 163-230.1, 163-230.2(e) and 163-230.3 restrict who can help request an absentee ballot to a near relative or verifiable legal guardian. Requesting an absentee

ballot is encompassed in the definition of “voting” and is therefore encompassed in Section 208. 52 U.S.C. § 10310. *See also, Democracy N.C.*, 476 F. Supp. 3d at 234-35 (holding that provisions of North Carolina election law that relate to various aspects of the absentee voting process are subject to the VRA); *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614-15 (5th Cir. 2017) (holding that “voting” is broadly defined in the “unambiguous language” of VRA). Thus, the above absentee ballot request provisions of state law directly contradict Section 208 by constraining who can help a Section 208 voter request an absentee ballot. *Democracy N.C.*, 476 F. Supp. 3d at 235.

Next, N.C. Gen. Stat. § 163-226.3(a)(4) prohibits those affiliated with a congregate care facility from helping a voter living in that facility in any way with the voting process, and N.C. Gen. Stat. § 163-226.3(a)(6) prohibits the voter from accepting assistance from this category of people. These provisions stand in direct contravention of Section 208. *Democracy N.C.*, 476 F. Supp. 3d at 235.

Finally, N.C. Gen. Stat. § 163-231(b)(1) limits who can assist a Section 208 voter with mailing an absentee ballot. Since mailing an absentee ballot is an “action required by law prerequisite to voting, casting a ballot, and having such ballot counted,” it is encompassed by Section 208. 52 U.S.C. § 10508; 52 U.S.C. § 10310. *See also, Democracy N.C.*, 476 F. Supp. 3d at 234 (applying definition of “voting” to absentee voting provisions).

Defendants contend that the challenged provisions of state law do not contradict Section 208 because the federal law mandates that a voter with a disability must be allowed “a” person of their choice to assist, but not “the” person of their choice. [D.E. 18, pp. 2, 12.] Defendants have asserted this argument before, to no avail. *See Democracy N.C.*, 476 F. Supp. 3d at 234 (rejecting Defendants’ argument that Section 208 does not conflict with North Carolina law).

This same argument has also been rejected elsewhere:

The Court is unconvinced that the use of the indefinite article ‘a’ evinces an intent by Congress to allow states to limit who may act as a voter assister under § 208. As the maxim goes, Congress does not hide elephants in mouseholes.

Ark. United v. Thurston, 2020 U.S. Dist. LEXIS 207145, *10 (W.D. Ark. 2020) (citation and quotation marks omitted). In *Ark. United*, the district court determined that the plaintiffs were likely to succeed on their claim that a state statute prohibiting one person from assisting with more than six ballots infringes on Section 208 rights. *Id.* at *11-12. In doing so, it rejected the argument that the state was permitted to circumscribe the range of assistors. *Id.*

Similarly, the Fifth Circuit rejected Texas’ claim that the state was permitted to limit assistance provided to Section 208 voters by allowing them to receive assistance only as to the actual marking of their ballot. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 615 (5th Cir. 2017). Reading the plain language of the Voting Rights Act, including the definition of “voting,” the Fifth Circuit held that “[t]he unambiguous language of the VRA resolves the parties’ disagreement.” *Id.* Here, the unambiguous language of Section 208 of the VRA likewise resolves the issue. *See* 52 U.S.C. § 10508 (allowing voters with disabilities to choose who they want to assist them).

The Middle District of North Carolina has previously determined that provisions of North Carolina law at issue in this case contravene Section 208¹:

¹ Only one individual plaintiff (a blind resident of a facility) was identified as having standing in the specific context of the Middle District case, limiting the court’s relief to that individual. *Democracy NC*, 476 F. Supp. 3d at 236. Here, Plaintiff DRNC has asserted associational and organizational standing based on its work representing the interests of all voters with disabilities whose Section 208 rights are infringed. [D.E. 1, ¶¶ 7, 31-38.] *See also, Wilson v. Thomas*, 43 F. Supp. 3d 628, 632, (E.D.N.C. 2014) (holding that DRNC represents the interests of North Carolinians with disabilities and has standing to pursue claims on their behalf). Defendants’ Motion to Dismiss does not challenge Plaintiff’s standing.

Regarding the marking and completing of absentee ballots, the court finds North Carolina essentially does not allow Plaintiff . . . to choose the person who will assist him. N.C. Gen. Stat. § 163-226.3(a)(4), also impermissibly restricts who may assist 208-voters who are patients "in any hospital, clinic, nursing home or rest home," . . . [and] suffers from a fatal constriction: it provides that if neither a near relative nor a legal guardian nor a [Multi-Partisan Assistance Team] is available to assist the voter within seven days of a request to the county board of elections, a voter may receive assistance from another constricted list of people, not including [individuals affiliated with a facility in which the voter lives or political candidates or party officials] N.C. Gen. Stat. § 163-226.3(a)(4). Thus, 208-voters must rely on either a near relative, a legal guardian, or a MAT if they are available before they may choose any other person to assist them.

The court finds these regulations impermissibly narrow Section 208's dictate. . . . [I]t does not appear to this court that a 208-voter . . . can be prohibited by state law from choosing the individual to assist them in voting. . . .

[The ballot] . . . delivery restrictions [contained in § 163-231(b)(1) and § 163-226.3(a)(5)] impermissibly dictate who may assist a 208-voter in delivering their absentee ballot by only allowing a delineated list of people to deliver an absentee ballot to the county board of elections.

Democracy N.C., 476 F. Supp. 3d at 235-36 (emphasis in original).

As the Middle District noted, Section 208 prohibits precisely what the absentee ballot request and transmission provisions do: limiting a voter to receiving assistance from a near relative, a legal guardian, or a team designated by the local board of elections. N.C. Gen. Stat. §§ 163-230.1, 163-231(b)(1) and 163-230.2. The same is true for the prohibition on assistance from staff or others affiliated with the voter's residential facility, which the Middle District determined "impermissibly restricts" these voters. *See* N.C. Gen. Stat. §§ 163-226.3(4) and (6) (prohibiting facility-affiliated individuals from providing, and residents from receiving, assistance with voting).

There is an irreconcilable conflict between Section 208 and the challenged state law provisions. Simultaneous compliance with these state and federal laws is not possible, and the challenged provisions of state law "stand[] as an obstacle to the accomplishment and execution

of their full purposes and objectives of Congress” evidenced in Section 208. *Gade*, 505 U.S. at 98, 112 S. Ct. at 2383.

II. Neither Section 208 Nor Its Legislative History Sanctions the Challenged State Law Provisions As Exceptions to Federal Law.

Defendants contend that the contradiction between Section 208 and the challenged provisions of North Carolina law is permissible because the intent behind both is the same. Nothing in Section 208 permits state-developed restrictions, regardless of the intent behind those restrictions. Defendants have pointed to nothing in the state statutes or elsewhere in support of any identifiable legislative intent and there is no evidence of intent in the record. The intent behind the challenged provisions of North Carolina law is a factual question that is not an appropriate consideration in connection with a motion to dismiss. Regardless of the intent behind them, the challenged provisions do precisely what Section 208 prohibits: they constrain the voter’s choice and substitute the state’s judgment about who should assist the voter.

A. Section 208 Does Not Sanction State-Created Limitations on The Right It Creates.

Nothing in Section 208 allows states to maintain restrictions that limit the rights created in Section 208. Permitting states to limit Section 208 rights is inconsistent with the very idea of conflict preemption, which Defendants acknowledge is the applicable analysis. [D.E. 18, p. 10.]

As one court has noted:

There is nothing in the statutory language to suggest that a state may burden, unduly or otherwise, the right articulated in § 208 The Court is not persuaded that it should import the undue-burden standard from First Amendment jurisprudence into a straightforward conflict preemption analysis.

Ark. United v. Thurston, 2020 U.S. Dist. LEXIS 207145, *10-11. Similarly, the Fifth Circuit rejected Texas’ effort to narrow the scope of Section 208 by narrowing its definition of what constituted “voting” for purposes of determining when assistance could be provided. *OCA-*

Greater Houston, 867 F.3d at 614-15. The Fifth Circuit determined, based on the plain meaning of the Voting Rights Act, that applying a less inclusive definition of voting impermissibly narrowed the rights protected by Section 208. *Id.* at 615. Finally, as detailed above, the Middle District of North Carolina determined that the challenged provisions of North Carolina law “impermissibly narrow Section 208’s dictate.” *Democracy N.C.*, 476 F. Supp. 3d at 235.

Defendants rely on *Ray v. Texas*, which involved a Texas statute limiting the number of absentee ballot request forms a witness was permitted to sign. 2008 U.S. Dist. LEXIS 59852 *2 (E.D. Tex. 2008). The Middle District rejected Defendants’ reliance on *Ray*, deeming it “inapposite” and “unpersuasive.” *Democracy N.C.*, 476 F. Supp. 3d at 236. Other courts have likewise rejected *Ray*. *See, e.g., In Re DSCC*, 950 N.W.2d 280, 288-89 (Minn. 2020) (rejecting defendants’ reliance on *Ray* where “Minnesota’s three-voter limit on marking assistance can be read to stand as an obstacle to the objectives and purpose of section 208”). Although not directly addressing *Ray*, the Fifth Circuit’s decision in *OCA-Greater Houston* undermined the notion that restrictions only violate Section 208 if they are an undue burden given the unambiguous language of Section 208 – which led the *Ark. United v. Thurston* court to “question[] whether the decision in *Ray* survives the Fifth Circuit’s decision in *OCA-Greater Houston*.” 2020 U.S. Dist. LEXIS 207145 at *11.

Defendants also cite to the denial of a preliminary injunction to the plaintiffs in *Priorities USA v. Nessel* as a basis for the Motion to Dismiss. [D.E. 18, pp. 2, 12.] That decision turned on evidence adduced regarding the plaintiffs’ request for a preliminary injunction. 487 F. Supp. 3d 599, 619-20 (E.D. Mich. 2020), *rev’d on other grounds*, 860 Fed. Appx. 419 (6th Cir.). The same court, however, had denied an earlier motion to dismiss the plaintiffs’ Section 208 claim based on the conflict alleged between Section 208 and state law. *Priorities USA v. Nessel*, 462

F. Supp. 3d 792, 816 (E.D. Mich. 2020). In the context of Defendants' Motion to Dismiss, the applicable ruling in *Priorities USA* is the ruling on the motion to dismiss, which ruling supports Plaintiff's position regarding the preemptive effect of the conflict between federal and state law.

Defendants have offered no controlling authority for their proposition that the state may limit the scope of Section 208. The cases Defendants cite have failed to persuade other courts, which have read Section 208 to mean what it says. Defendants' attempts to constrict the provisions of Section 208 should not be permitted.

B. Defendants' Assertion of the State's Interest In Restricting Section 208 Are Unsupported and Would Nevertheless Fail to Justify Limiting Rights Created By Federal Law.

As noted, Defendants assert that the interests of the state in restricting who may assist voters is meant to protect those voters from manipulation [D.E. 18, pp. 18-20.] Nothing on the face of the challenged North Carolina statutes asserts that interest or intent, and Defendants point to no support for this factual assertion. Moreover, as the Supreme Court has noted, "it is not enough to say that the ultimate goal of both federal and state law is the same. A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach that goal." *Gade, supra*, 505 U.S. at 103, 112 S. Ct. at 2385.

To the extent that Defendants' argument is meant to imply that the challenged state laws are intended to address voting misconduct by third parties, there are other provisions of state law that prohibit voter intimidation and manipulation. *See, e.g.*, N.C. Gen. Stat. §§ 163-273(a) (prohibiting interference with a voter), 163-274(a)(7) (prohibiting voter intimidation), and 163-275 (prohibiting various forms of fraud in voting). *See also, United States v. Berks County*, 250 F. Supp. 2d 525, 538 (E.D. Pa. 2003) (noting, in the context of assistance at the polls, that "the Court has no basis to assume that illegal assistance will take place, and must give deference to

the provisions of Section 208. The elected polling officials must adhere to Section 208, but have discretion to prevent what would otherwise be illegal assistance.”)

Defendants cannot rely on an assertion that the legislative intent of the challenged statutes is the same as the legislative intent of Section 208. Moreover, presuming criminal conduct by third parties is an insufficient basis for restricting voting rights, and, as described below, is at odds with the purposes and objectives of Congress.

C. The Senate Report Regarding Section 208 Does Not Sanction the State-Created Exceptions At Issue In This Case.

Congress’ purpose and objectives in adding Section 208 are plain on the face of the statute and explained in the Senate Report accompanying its introduction. The statute’s facial purpose is to give voters with disabilities the affirmative right to choose who will help them vote, with two designated exceptions for employers and union agents. 52 U.S.C. § 10508. The Senate Report explains why:

The manner of providing assistance has a significant effect on the free exercise of the right to vote by such people who need assistance. Specifically, it is only natural that many such voters may feel apprehensive about casting a ballot in the presence of, or may be misled by, **someone other than a person of their choice.**

....

To limit the risks of discrimination against voters in these specified groups and avoid denial or infringement of their right to vote, the Committee has concluded that they **must be permitted to have the assistance of a person of their own choice.** The Committee concluded that **this is the only way to assure meaningful voting assistance and to avoid possible intimidation or manipulation of the voter.** To do otherwise would deny these voters the same opportunity to vote enjoyed by all citizens.

Senate Committee, S. Rep. 97-417, 1982 U.S.C.C.A.N. 177, 240-41 (emphases added). The Congressional antidote to voter apprehension and potential intimidation or manipulation is that the voter gets to decide who will provide assistance. *Id.* at 241. The right to choose an assistant is not just an important defense against interference; it is the sole means articulated by Section

208. So critical was this basis that even the prohibition against assistance by an employer would have to give way to a voter's choice if necessary due to the voter's membership in a language minority or the insular nature of the voter's community. *Id.* at 242. In such circumstance, "the burden on the individual's right to choose a trustworthy assistant would be too great to justify application of the bar on employer assistance." *Id.*²

On their face, the challenged statutes add restrictions and limitations on the ability of Section 208 voters to choose an assistant – a circumstance that the Senate Report expressly stated was inconsistent with Section 208:

The Committee intends that voter assistance **procedures**, including measures to assure privacy for the voter and the secrecy of his vote be **established in a manner which encourages greater participation** in our electoral process. 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.**

1982 U.S.C.C.A.N. 177, 241 (emphases added). The Senate Report does not provide a blank check on which states may write additional restrictions; it merely notes that states have a right to establish election *procedures*, but cautions that those procedures must support, rather than circumscribe, the provision of assistance to Section 208 voters. The examples highlight this, referring to procedures "to assure privacy . . . and . . . secrecy," which would enable (rather than restrict) the rights provided for by the text of Section 208. It is in the context of state elections *procedures* that the Report says that "State provisions would be preempted only to the extent that they unduly burden the right recognized in this section."³ 1982 U.S.C.C.A.N. 177, 241. The

² The paramount nature of the individual's choice has been protected even in the context of a state's prohibition on candidate assistance. *See, Minn. Op. Atty. Gen.* 28a6, May 7, 2020, <https://www.ag.state.mn.us/Office/Opinions/28a6-20200507.pdf> (citing court's Section 208 preemption of candidate restriction because "Congress saw the individual's ability to determine who would be trustworthy assistant as an internal check against manipulation").

³ The Senate Report indicates that the determination of whether a state procedure represents an

challenged state statutes do not establish procedures in support of Section 208 rights; by their express terms, they establish limitations on who may assist. Nowhere does the Senate Report endorse direct restriction of the rights afforded by Section 208, such as the ones at issue here.

Instead, the Senate Report identifies the right of voters with disabilities to choose as the most effective means of *protecting the right to vote* and promoting participation in voting. Defendants have turned this idea on its head, contending (without support) that state law will *protect the individual* by limiting their choices. Narrowing the choices for voters with disabilities forces them to disclose their voting preferences to specific individuals – near relatives or guardians - who may or may not approve, and who may or may not maintain the voter’s privacy. Section 208 empowers the voter to decide who to trust. The Senate Report expresses the unambiguous conviction that the best way to protect voters’ rights is to *not limit* choice.

Defendants’ position is, essentially, that the challenged sections of North Carolina law exist to protect voters with disabilities from choosing people that the state thinks they should not trust. The state thinks voters with disabilities should trust - and should only trust - designated close relatives or guardians almost exclusively. *See, e.g.*, N.C. Gen. Stat. § 163-230.1, 230.2, 230.3, and 231(b)(1) (limiting voters to obtaining assistance from near relatives or guardians). This is paternalism. *See* 42 U.S.C. § 12101(a)(3) and (5) (finding by Congress, in adopting the Americans with Disabilities Act, that discrimination against individuals with disabilities has included the imposition of “overprotective rules and policies” and discrimination in voting). Defendants’ argument for constraining choice is completely contrary to the choice provision of Section 208 and the Senate Report’s express rationale for making choice the means of protecting

undue burden is “a practical one dependent upon the facts.” 1982 U.S.C.C.A.N. 177, 241. Even if applicable, Defendants’ claim of a right to limit Section 208 rights pursuant to this section of the Senate Report would be premature at the motion to dismiss stage.

the right to vote. The Senate Report does not sanction limitations on the scope of Section 208 that allow a state to impose its judgment about who a voter should choose.

Rather than protecting the rights of voters with disabilities, the challenged provisions impermissibly limit the scope of Section 208 and are therefore preempted.

CONCLUSION

Section 208 of the Voting Rights Act is clear and unambiguous in granting voters with disabilities the right to choose who will assist them in voting. Congress' purposes and objectives in enacting Section 208 are undermined by the challenged provisions of state law which impermissibly restrict the rights granted. The challenged provisions of state law are therefore subject to preemption. Plaintiff has stated a claim for relief, and Defendants have failed to establish an entitlement to dismissal.

For the foregoing reasons, Defendants' Motion to Dismiss should be denied.

This 6th day of December, 2021.

Respectfully submitted,

/s/ Lisa Grafstein

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WORD COUNT CERTIFICATION
L.R. 7.2(f)(3)

Pursuant to Local Rule 7.2(f)(3), the undersigned certifies that the word count for Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion to Dismiss is 4041 words. In making this certification, the undersigned has relied upon Microsoft Word and its word count feature.

This the 6th day of December, 2021. /s/ Lisa Grafstein
 Lisa Grafstein