UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

INTERNATIONAL ALLIANCE OF THEATER STAGE EMPLOYEES LOCAL 927, Plaintiff, v. JOHN FERVIER, EDWARD LINDSEY, JANICE W. JOHNSTON, SARA TINDALL GHAZAL, and RICK JEFFARES, in their official capacities as members of the Georgia State Election Board; and PATRISE PERKINS-HOOKER, AARON V. JOHNSON, MICHAEL HEEKIN, and TERESA K. CRAWFORD in their official capacities as members of the Fulton County Registration and Elections Board, Defendants.	Case No. 1:23-cv-04929-AT

PLAINTIFF'S OPPOSITION TO SEB DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT

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INTRODUCTION

For more than fifty years, Section 202(d) of the Voting Rights Act ("VRA") has required states to allow any qualified voter who may be absent from their election district on the day of a presidential election to vote absentee so long as they have applied for an absentee ballot at least seven days before the election. In clear contravention of this mandate, Georgia law requires voters to apply for an absentee ballot at least eleven days before election day. When applied to presidential elections, the state's deadline deprives Georgians of rights guaranteed by the VRA.

Plaintiff International Alliance of Theater State Employees Local 927 ("IATSE"), a local union representing theater and television production professionals, advances the well-being of its members by advocating for issues and candidates that support workers' rights. Am. Compl. ¶ 13, ECF No. 62. IATSE members have worked in locations outside of their home county in six of the last seven general elections and are certain to do so again. But, this year, these members will have less time to submit their absentee ballot applications due to Georgia's failure to comply with the VRA. *Id*. ¶¶ 15–17.

The State Election Board ("SEB") Defendants do not dispute the statute's plain meaning, which entitles IATSE's traveling members to vote absentee if they apply up to seven days before election day. Instead, they insist that IATSE's injury is remote or speculative unless it can demonstrate its members will in fact be

prohibited from voting because of Georgia's unlawful application deadline. But that has never been a requirement of Article III standing; laws that impede access to voting impose a cognizable injury even when they do not deny the franchise outright. *See Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1351–52 (11th Cir. 2009). IATSE's allegations easily meet this standard: its members regularly work long hours away from their election districts and consequently rely on absentee voting, Am. Compl. ¶ 15, but Georgia's eleven-day deadline impedes their ability to do so, restricting their access to absentee ballots contrary to requirements of federal law.

This injury, moreover, is neither remote nor speculative. IATSE members are consistently required to travel away from their election district and members almost certainly will be stationed away from home during the upcoming November election. These traveling members will not receive an absentee ballot unless they return their applications within the truncated schedule imposed by Georgia law, which impedes their access to voting in violation of the VRA. And this impairment of their rights is traceable to (and redressable by) SEB Defendants who supervise Georgia elections, exercise direct control over election officials, and are specifically authorized to promulgate rules implementing the application deadline.

Finally, Supreme Court precedent confirms that private plaintiffs can sue for violations of Section 202(d) of the VRA. Section 202(d) creates individual rights and, in the absence of a comprehensive enforcement scheme that is incompatible

with private enforcement—which Section 202(d) does not have—those rights are enforceable through a private right of action under 42 U.S.C. § 1983.

The motion to dismiss should be denied.

ARGUMENT

When considering a motion to dismiss, "the court must accept the facts alleged in the complaint as true and construe them in the light most favorable to the plaintiff." *Amin v. Mercedes-Benz USA, LLC*, 301 F. Supp. 3d 1277, 1283 (N.D. Ga. 2018). The threshold for surviving a motion to dismiss is "exceedingly low," *Covad Commc'ns Co. v. BellSouth Corp.*, 374 F.3d 1044, 1047 (11th Cir. 2004) (quoting *Quality Foods de Centro Am., S.A. v. Latin Am. Agribusiness Dev. Corp., S.A.*, 711 F.2d 989, 995 (11th Cir. 1983)), and the claims here easily surpass that low threshold. IATSE alleges sufficient facts to establish that Georgia's eleven-day absentee ballot application deadline injures its members, and that their injuries are traceable to and redressable by SEB Defendants. Finally, Supreme Court precedent confirms that statutes conferring private rights, like Section 202 of the VRA, are privately enforceable under 42 U.S.C. § 1983.

I. IATSE has associational standing to challenge SEB Defendants' enforcement of Georgia's absentee ballot application deadline.

An organization has standing to sue in federal court on behalf of its members "when its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization's purpose, and neither the claim

asserted nor the relief requested requires the participation of individual members in the lawsuit." *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1160 (11th Cir. 2008).[1] IATSE has sufficiently alleged that its members will suffer "(1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision." *Ga. Ass'n of Latino Elected Offs., Inc. v. Gwinnett Cnty. Bd. of Registration & Elections*, 36 F.4th 1100, 1113 (11th Cir. 2022). These allegations establish, and settled precedent confirms, that IATSE has sufficiently pled associational standing.

A. Georgia's absentee ballot application deadline imposes an injury-in-fact on IATSE's membership.

SEB Defendants attempt to raise the bar for cognizable injuries by suggesting that IATSE must identify a specific member who was completely deprived of their right to vote by being "unexpectedly . . . required to travel during that narrow window between eleven and seven days before Election Day." Defs.' Br. Supp. Mot. to Dismiss Am. Compl. at 8, ECF No. 68-1 ("Br."). But that is not the test: IATSE only must allege facts sufficient to show a realistic possibility that enforcement of the eleven-day deadline will make it more difficult for at least one of its members to apply for an absentee ballot. *See Common Cause/Ga.*, 554 F.3d at 1351.

[1] Only the first of these elements is seriously contested here. SEB Defendants tangentially address germaneness in a footnote and make no argument whatsoever regarding the participation of individual members in this case.

Here, injury is not just likely, it is almost certain to occur. The VRA gives IATSE's traveling members until seven days before a presidential election to apply for an absentee ballot to vote in that election; Georgia law cuts four days off of that period. O.C.G.A. § 21-2-381(a)(1)(A). And IATSE's members have been forced to travel outside their election district in the past during presidential elections—sometimes on very short notice—and will do so in the future. When this occurs, voting by mail is a vital, and sometimes the only, option for members to vote. These members *must* be able to apply for an absentee ballot in order to vote in the presidential election. *See* Am. Compl. ¶¶ 15–17; *see also* 52 U.S.C. § 10502(d). Georgia's eleven-day deadline therefore will make it more difficult for IATSE members to exercise rights conferred to them under federal law. Am. Compl. ¶ 5.

Contrary to SEB Defendants' novel theory, the reduction in time to request absentee ballots is more than enough to satisfy the injury-in-fact requirement. *Common Cause/Ga.*, 554 F.3d at 1351. That IATSE members may ultimately overcome these obstacles is irrelevant; having less time to accomplish a task necessary to vote absentee is a "concrete, particularized, non-hypothetical injury to a legally protected interest" sufficient for standing. *Id*. at 1351 (quoting *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005)).

SEB Defendants' reliance on *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917 (11th Cir. 2020), and *City of South Miami v. Governor of the State of Florida*,

65 F.4th 631 (11th Cir. 2023), is misplaced. In *Muransky*, the plaintiff alleged a statutory violation of the Fair and Accurate Credit Transaction Act's prohibition against "printing more than the last five digits of a card number" on receipts, with no accompanying allegations of harm. 979 F.3d at 921, 934. That is a far cry from Georgia's eleven-day application deadline, which imposes an affirmative obligation on IATSE's members that they must comply with to exercise their right under federal law to vote absentee for President and Vice President. And in *City of South Miami*, the Eleventh Circuit found speculative plaintiffs' fears that a state law requiring local law enforcement to cooperate with federal immigration officials would result in government targeting of the organizations' members for deportation. 65 F.4th at 637. The injury in this case, however, requires no guesswork: IATSE's traveling members *must* navigate Georgia's eleven-day application deadline to vote absentee. The challenged law directly impedes their ability to do so, giving them less time to complete their applications and return them to election officials while on the road. And, while not required for standing, it is also worth emphasizing that, when those members find themselves deployed before the VRA's seven-day deadline but after Georgia's eleven-day cutoff, the challenged law will cause them to lose the opportunity to vote absentee altogether.

While relying on inapt authorities, SEB Defendants bypassed the Eleventh Circuit's ruling in a more analogous voting rights case, *Common Cause/Georgia*,

554 F.3d at 1351–52, which recognized that a voter identification law causes injury to all voters who must comply—even those who already possess the required identification. The court's analysis of individual voters' standing is instructive:

> Even if [the voters] possessed an acceptable form of photo identification, they would still have standing to challenge the statute that required them to produce photo identification to cast an in-person ballot. A plaintiff need not have the franchise wholly denied to suffer injury . . . requiring a registered voter either to produce photo identification to vote in person or to cast an absentee or provisional ballot is an injury sufficient for standing. The inability of a voter to pay a poll tax, for example, is not required to challenge a statute that imposes a tax on voting.

Id. (cleaned up). So too here. That IATSE members who will be away from their election district on election day must now comply with an earlier eleven-day deadline to apply for an absentee ballot is more than a sufficient injury to establish Article III standing under this binding precedent. *See id*.

SEB Defendants' remaining arguments against IATSE's injury allegations are simply variations of the same legal errors identified above:

First, SEB Defendants assert that IATSE "assumes all voters have a right to vote absentee," Br. at 6, but make no attempt to reconcile that argument with the claims before the Court. IATSE seeks to enforce the VRA, which grants voters (including IATSE members) who may be absent from their election districts on election day an express federal right to vote absentee in elections for President and Vice President if they submit their applications at least seven days before election

day. *See* 52 U.S.C. § 10502(d); *see also* Am. Compl. ¶ 5 (alleging Georgia's application deadline deprives IATSE members of "the rights conferred by the Voting Rights Act when voting for President and Vice President"). Whether "all voters have a right to vote absentee" is irrelevant.

Second, SEB Defendants claim that IATSE's members are not harmed because they *might* be able to vote absentee in person, Br. at 7; but SEB Defendants reach that conclusion only by rejecting IATSE's factual allegations in favor of their own speculation. *But see Alexander v. Acct. Discovery Sys., LLC*, No. 1:17-CV-4351-AT, 2018 WL 11343724, at *2 (N.D. Ga. Feb. 21, 2018) (where defendant facially challenges standing, "[t]he Court will accept as true the allegations in Plaintiff's Complaint for the purpose of ruling on Defendant's motion to dismiss"). IATSE alleged that its members have been touring with productions during the presidential election, and some spend months on the road, Am. Compl. ¶¶ 14–16; SEB Defendants offer no basis to surmise that some of these individuals—much less all of them—may return to vote in person during early voting.

Such speculation is not only insufficient to defeat standing, but also legally irrelevant. The potential availability of other means and mechanisms for voting does not eliminate the injury caused by SEB Defendants' enforcement of the eleven-day absentee ballot application deadline. Indeed, the Eleventh Circuit has recognized that requiring voters to either comply with the challenged rule or choose another method

of voting "is an injury sufficient for standing." *Common Cause/Ga.*, 554 F.3d at 1351–52 (finding a requirement that voters either produce photo identification in order to vote in person or cast an absentee ballot creates a sufficient injury for standing—even for voters who possess identification); *see also Nielsen v. DeSantis*, 469 F. Supp. 3d 1261, 1266 (N.D. Fla. 2020) ("A rule that significantly restricts a voter's ability to vote when the voter wishes inflicts an injury in fact.").

Third, SEB Defendants argue that "the alleged injury here is far too speculative" because IATSE has not alleged that any specific member "had unexpectedly been required to travel during that narrow window between eleven and seven days before Election Day." Br. at 7, 8. For standing purposes, though, IATSE does not need to show that any particular member was unable to vote because of the eleven-day deadline; it is enough that Georgia's deadline reduces the amount of time that IATSE members have to submit their ballot applications. *See Common Cause/Ga.*, 554 F.3d at 1351; *Nielsen*, 469 F. Supp. 3d at 1266. IATSE has alleged facts sufficient to show that at least one of its members faces the realistic possibility of needing to comply with Georgia's truncated deadline, which is sufficient to survive a Rule 12 motion. *See Am. Coll. of Emergency Physicians v. Blue Cross & Blue Shield of Ga.*, 833 F. App'x 235, 240 n.8 (11th Cir. 2020) ("[W]e note that for prospective equitable relief . . . requiring specific names at the motion to dismiss stage is inappropriate."); *Hancock Cnty. Bd. of Supervisors v. Ruhr*, 487 F. App'x

189, 198 (5th Cir. 2012) (same); *Am.'s Health Ins. Plans v. Hudgens*, 915 F. Supp. 2d 1340, 1351 n.13 (N.D. Ga. 2012) (same); *Suncoast Waterkeeper v. City of Gulfport*, No. 8:17-cv-35-T-24-MAP, 2017 WL 1632984, at *6 (M.D. Fla. May 1, 2017) (same).

Fourth, SEB Defendants argue that IATSE members would be unable to submit an absentee-ballot application, receive a ballot, and vote the ballot within the seven days provided for under the VRA. Br. at 10–11. This argument again misunderstands the nature of the injury and furthermore relies on unsupported speculation. It also asks this Court to second-guess Congress's determination that seven days is sufficient time for a voter to submit an application and receive and vote their ballot; there is no cause for the Court to do so here.

B. The injury inflicted upon IATSE members is traceable to SEB Defendants because they oversee and enforce Georgia election law.

Traceability "is not an exacting standard," and is met even where the injury "flow[s] indirectly" from the defendant's actions. *Walters v. Fast AC, LLC*, 60 F.4th 642, 650 (11th Cir. 2023). In the context of elections, "[a]n injury is traceable to an election official responsible for the election administration process or rule that allegedly has caused the plaintiff's injury." *Fair Fight Action, Inc. v. Raffensperger*, 634 F. Supp. 3d 1128, 1185 (N.D. Ga. 2022). Although immediate responsibility for processing absentee ballot applications rests with county election officials, O.C.G.A. § 21-2-384, Georgia law also gives the State Election Board a significant role in

enforcing election laws, including a statutory duty "[t]o formulate, adopt, and promulgate such rules and regulations, consistent with law, as will be conducive to the fair, legal, and orderly conduct of . . . elections," O.C.G.A. § 21-2-31(2).

Another court in this district has found that this same provision renders the State Election Board responsible for compliance with Section 2 of the VRA, and violations of the VRA were traceable to and redressable by the Secretary, who sits as the chair of the State Election Board. *See Rose v. Raffensperger*, 511 F. Supp. 3d 1340, 1356 (N.D. Ga. 2021). Indeed, SEB Defendants also have a statutory duty "[t]o promulgate rules and regulations so as to obtain uniformity in the practices and proceedings" of county election officials, O.C.G.A. § 21-2-31, the power to levy functionally unappealable civil penalties on county officials who violate the law, *id.* § 21-2-33.1(a), (c), (d), and the ability to "suspend county or municipal superintendents and appoint an individual to serve as the temporary superintendent . . . [with] all the powers and duties of a superintendent," *id.* § 21-2-33.1(f)—all of which establish a connection to the administration and enforcement of Georgia's absentee voting scheme sufficient for traceability and redressability.

SEB Defendants' cited authorities do not compel a different result. For one, their reliance on *In re Georgia Senate Bill 202* glosses over important distinctions between challenges to absentee ballot rejections and the application deadline at issue here. No. 1:21-mi-55555-JPB, 2023 WL 5334582 (N.D. Ga. Aug. 18, 2023). In

Senate Bill 202, another court in this district held that injuries caused by the rejection of absentee ballots are not traceable to or redressable by the Secretary or the State Election Board, *id*. at *6; but unlike the absentee ballot processing and verification provisions that the court considered (and which SEB Defendants cite in their brief), O.C.G.A. § 21-2-386, the election code provisions governing absentee ballot *applications* grant SEB Defendants express "authori[ty] to promulgate reasonable rules and regulations for the implementation of" application procedures, including the eleven-day deadline, O.C.G.A. § 21-2-381(e). And when faced with a separate challenge to an absentee ballot *application* requirement, the same court found that the plaintiffs' injuries were traceable to and redressable by the State Election Board and its members. *Vote.org v. Ga. State Election Bd.*, 661 F. Supp. 3d 1329, 1337–38 (N.D. Ga. 2023) (Boulee, J.).

The conclusion that IATSE members' injuries are traceable to SEB Defendants is consistent with the Eleventh Circuit's analysis in *Jacobson v. Florida Secretary of State*, 974 F.3d 1236, 1253 (11th Cir. 2020). That case involved a challenge to the order in which candidates' names were printed on ballots. *Id.* As in Georgia, Florida law gives primary responsibility for election administration to county supervisors, with a state official (there, the Secretary of State) charged with overseeing elections more broadly. *See id.* at 1254. The Eleventh Circuit held that any injury caused by the ballot order was not traceable to the Secretary but explained

that this holding "rests on the reality that the Supervisors are independent officials under Florida law *who are not subject to the Secretary's control*." *Id.* at 1253 (emphasis added). Key to this holding was that "[o]nly the Governor of Florida, not the Secretary, may suspend county officials such as the Supervisors, and only the state senate may remove them from office" and that "the only means of control the Secretary has over the Supervisors is through coercive judicial process." *Id.* Traceability therefore was not established "[b]ecause the Supervisors are independent officials not subject to the Secretary's control." *Id.*

Unlike in Florida, Georgia county election officials *are* subject to the State Election Board's control. SEB Defendants can issue orders requiring county election officials to comply with the rules SEB Defendants have promulgated, O.C.G.A. § 21-2-33.1(a); they can publicly reprimand county officials and require them to attend training sessions, *id.*; they can impose significant financial penalties that cannot be overturned other than for failure to provide notice, *id.* § 21-2-33.1(d); and, most significantly, they can suspend county election officials and appoint individuals to take over their duties, *id.* §21-2-33.1(f). Because SEB Defendants exercise substantial control over county election officials—including in their enforcement of the eleven-day deadline—IATSE members' injuries are fairly traceable to them. *Cf. Mecinas v. Hobbs*, 30 F.4th 890, 900 (9th Cir. 2022) (finding

injury traceable to state's chief election official where county officials lacked discretion to disregard their instructions).[2]

C. Injunctive relief against SEB Defendants would redress the injury.

For purposes of redressability, "the relief sought need not be complete," *Garcia-Bengochea v. Carnival Corp.*, 57 F.4th 916, 927 (11th Cir. 2023); it is enough that a favorable decision "would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered." *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1260 n.7 (11th Cir. 2010) (quoting *Utah v. Evans*, 536 U.S. 452, 464 (2002)). An order enjoining SEB Defendants from implementing or enforcing the eleven-day application deadline (and requiring compliance with federal law) would significantly increase the likelihood that IATSE members would have until seven days before election day to submit an absentee ballot application.

Contrary to SEB Defendants' claims, county election officials could not simply continue to enforce the eleven-day deadline if directed not to by the State Election Board, because the Board can discipline county officials who fail to follow SEB directives, including by fining or removing them. *See* O.C.G.A. § 21-2-33.1.

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[2] *In re Georgia Senate Bill 202* also relied on *Jacobson* in determining that the harms caused by rejecting undated or misdated absentee ballots were not traceable to SEB Defendants but did not address the differences between the Florida Secretary of State's limited role in overseeing elections in that state and the greater control afforded to Georgia state election officials. 2023 WL 5334582, at *6.

Because SEB Defendants have the power to unilaterally enforce rules and regulations against county officials, relief ordered against the SEB Defendants would effectively bind those officials.[3] *See Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1338 n.2 (N.D. Ga. 2018) (redressability satisfied where SEB Defendant "has the power to notify counties of errors in their computation and tabulation of votes, and to direct them to re-certify such returns").

D. IATSE satisfies the remaining elements of associational standing.

Having adequately alleged an injury to its members, IATSE easily satisfies the remaining elements of associational standing. Protecting the voting rights of its members is germane to IATSE's core mission of advancing the interests of its members, including by supporting their participation in democracy and advocating for the election of politicians who support trade unions. Am. Compl. ¶ 13. This is particularly true here, where the issue involves members' ability to vote while they are away from their election districts due to the demands of their profession. *See Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1322 (S.D. Fla. 2008) (recognizing that in suit

[3] SEB Defendants' digression about the propriety of obtaining relief against Fulton County, as opposed to all 159 counties, is neither relevant nor legally correct. Br. at 14 n.5. Their footnote makes no attempt to explain why *Bush v. Gore* impacts any of the standing elements they have raised, nor do they cite a single authority that would require IATSE to sue every county in Georgia—including counties where the association does not even operate—in order to enforce the VRA. *See New Ga. Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1286 n.16 (N.D. Ga. 2020) (rejecting argument "that Plaintiffs should have sued all one hundred and fifty-nine (159) counties in Georgia").

brought by labor unions challenging Florida's voter registration deadline "the Eleventh Circuit has decided Plaintiffs have the requisite standing"); *see also Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004) (holding labor unions had associational standing to challenge Ohio's provisional balloting rules). Furthermore, because IATSE seeks only injunctive and declaratory relief, the participation of individual members is not necessary. *Am. Coll. of Emergency Physicians*, 833 F. App'x at 239 ("When an organization seeks injunctive relief, individual participation of the organization's members is not normally necessary.") (quotation marks omitted).

SEB Defendants suggest in a footnote that protecting the voting rights of its members is not germane to IATSE's purpose, relying on out-of-context citations to *Northeast Ohio Coalition for Homeless & Service Employees International Union v. Blackwell*, 467 F.3d 999 (6th Cir. 2006), and *Knox v. Service Employees International Union*, 567 U.S. 298, 320 (2012). Neither of these cases have any bearing on IATSE's standing in this action. In *Northeast Ohio Coalition*, the Sixth Circuit determined that the plaintiffs failed to establish associational standing because "the complaint contains no reference at all to injury to the plaintiffs' members," and then noted in dicta that there was "scanty information about the plaintiff organizations in the complaint" for purposes of assessing whether the interests at stake were "germane to the organizations' purposes." 467 F.3d at 1010.

Here, however, IATSE has explained that its members' voting rights are germane to its purposes, which include "advocat[ing] for the election of candidates at all levels of government who support both the rights of workers and the cultural traditions and institutions that have brought Atlanta international renown." Am. Compl. ¶ 13. *Knox* is completely inapposite: there, the court discussed "germaneness" only in the context of limitations on the circumstances under which a public sector union can use nonmember dues to engage in political activity. 567 U.S. at 320 (clarifying that compulsory fees on nonmembers cannot be used for purposes not directly related to negotiating contracts). That issue has no bearing on whether voting rights are or can be germane to a labor union's core mission.

In sum, IATSE has satisfied all pre-requisites for associational standing.

II. IATSE has a private right of action to enforce the Voting Rights Act.

Section 202(d) of the Voting Rights Act creates a federal right to absentee voting in presidential elections for voters away from their jurisdiction on election day—consistent with minimum federal standards—and IATSE is entitled to vindicate that right on behalf of its members in a private suit. SEB Defendants notably do not deny that Section 202(d) creates a federal right; instead, they merely dispute whether there are private remedies available to vindicate that right. Br. at 20–21. But as the Supreme Court has recently emphasized, federal rights are presumptively enforceable under § 1983, and it is SEB Defendants' burden to

identify a "comprehensive enforcement scheme that is incompatible with individual enforcement under § 1983," *Health & Hosp. Corp. of Marion Cnty. v. Talevski*, 599 U.S. 166, 186 (2023) (quotations omitted), before this Court may find otherwise.

Here, SEB Defendants' only contention is that enforcement by the Attorney General is "sufficient[]"—they never even argue that private enforcement would be incompatible. Br. at 20–21. This falls far short of demonstrating the "necessary discordance between § 1983 and a rights-conferring statute's remedial scheme" that would merit precluding private enforcement. *Talevski*, 599 U.S. at 187. Therefore, the Court should find that IATSE's private suit can proceed, as Congress intended.

A. Section 202(d) creates an individual, federal right.

The text of Section 202(d) bears all the hallmarks of "[r]ights-creating language." *Shotz v. City of Plantation*, 344 F.3d 1161, 1167 (11th Cir. 2003). Specifically, it (1) "is clearly intended to benefit individuals," (2) has requirements that are "specific rather than amorphous," and (3) uses language that is "clearly mandatory," *Schwier v. Cox*, 340 F.3d 1284, 1292 (11th Cir. 2003):

> "**[E]ach State shall provide by law for the casting of absentee ballots** for the choice of electors for President […] **by all duly qualified residents of such state who may be absent** from their election district […] on the day such election is held **and who have applied therefor not later than seven days immediately prior** to such election and have returned such ballots […] not later than the time of closing of the polls […]."

52 U.S.C. § 10502(d) (emphasis added).

First, by singling out "duly qualified residents . . . who may be absent," Section 202(d) identifies "the class for whose especial benefit the statute was enacted." *Shotz*, 344 F.3d at 1167 n.7; *see also Talevski*, 599 U.S. at 186 (finding rights-creating language where provision had "unmistakable focus on the benefited class").

Second, Section 202(d) imposes specific requirements: (1) absentee voting must be made available in presidential elections to voters who may be away from their jurisdiction on election day, (2) those voters must be permitted to request an absentee ballot up until seven days prior to the election, and (3) those voters must be permitted to return those ballots at least up until the close of polls on election day. 52 U.S.C. § 10502(d).

Third, Congress used mandatory language in Section 202(d) in declaring that "each state *shall* provide" absentee voting minimally consistent with these requirements. *Id*. (emphasis added). In doing so, the provision "establish[es] who it is that must respect and honor these statutory rights." *Talevski*, 599 U.S. at 185.

By these terms, Congress "unambiguously confers rights" upon voters who may be absent from their jurisdiction on the day of a presidential election. *Id*. at 184.

B. Section 202(d) is privately enforceable under § 1983.

Because Section 202(d) establishes a federal right, it is presumptively enforceable under § 1983. *Talevski*, 599 U.S. at 184. To defeat that presumption,

SEB Defendants bear the burden of demonstrating that Congress created a "comprehensive enforcement scheme that is incompatible with individual enforcement." *Id*. at 186. This is a high burden, and it is not met here. *See Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 256 (2009) (explaining courts "should not lightly conclude that Congress intended to preclude reliance on § 1983").

Last year, the Supreme Court again confirmed that "the *sine qua non* of a finding that Congress implicitly intended to preclude a private right of action . . . is incompatibility between enforcement under § 1983 and the enforcement scheme that Congress has enacted." *Talevski*, 599 U.S. at 187. The only purportedly "comprehensive" enforcement scheme identified by SEB Defendants is the *option* for the U.S. Attorney General to enforce Section 202(d). Br. at 20–21. SEB Defendants never argue that enforcement by the Attorney General would be incompatible with private enforcement; they merely claim that it is "sufficiently comprehensive." Br. at 21. But that does not clear the *Talevski* bar. Furthermore, SEB Defendants could not argue that Congress viewed these enforcement mechanisms as incompatible because the VRA *expressly* contemplates the coexistence of these two enforcement mechanisms. 52 U.S.C. § 10302 (providing remedies for proceedings instituted by "the Attorney General or an aggrieved person"). In that sense, Congress has already determined that private and public enforcement will "complement" rather than "supplant" each other. *Talevski*, 599

U.S. at 190. This is in stark contrast to the circumstances in *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*—upon which SEB Defendants rely, Br. at 20—where the Court identified a whole range of statutory remedies, "including the *two* citizen-suit provisions" that would be *usurped* by permitting private enforcement via § 1983. 453 U.S. 1, 20–21 (1981) (emphasis added).

Because IATSE brought its suit under § 1983—which comfortably co-exists with enforcement by the Attorney General—it can vindicate the rights of its members under Section 202(d) in a private suit.

C. Section 202(d) is privately enforceable under the Voting Rights Act.

Even without § 1983, IATSE is separately entitled to vindicate the rights of its members under the VRA as an implied private right of action. Where a federal right is found and there is no express right of action within the statutory scheme, the Court then proceeds to analyze two factors to determine whether there is an implied private remedy: (1) "the statutory structure within which the provision in question is embedded," and (2) the "legislative history and context within which a statute was passed." *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1295 (11th Cir. 2015). Both factors weigh in favor of finding a private right of action under the VRA.

First, the statutory structure of the VRA supports finding a private right of action. Section 3 of the Act, which is titled "Proceeding to enforce the right to vote," expressly contemplates "proceeding[s] instituted by the Attorney General *or* an

aggrieved person under *any* statute to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. § 10302(b) (emphasis added). And there can be no doubt that Section 202 is one such statute to enforce the fourteenth amendment because it says so expressly. 52 U.S.C. § 10502(b) (explaining that the provision was enacted "to enforce the guarantees of the fourteenth amendment"). The Supreme Court has held that an express invocation of the Fourteenth and Fifteenth Amendments in a voting-related provision, "by its terms," implicates the enforcement provisions in Section 3. *Morse v. Republican Party of Va.*, 517 U.S. 186, 233–34 (1996) (citing Section 10(b) of the VRA).

SEB Defendants make much of the availability of enforcement by the Attorney General. Br. at 18. But the creation of one enforcement mechanism only "suggests" the exclusion of others when Congress is otherwise "silen[t]" on alternative means of enforcement. *PCI Gaming Auth.*, 801 F.3d at 1295 (quoting *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 789 F.3d 1206, 1217 (11th Cir. 2015)). Here, Congress has broken that silence and made express its intention to facilitate private enforcement in addition to enforcement by the Attorney General. 52 U.S.C. § 10302(a)-(c). Congress even included a fee shifting provision of identical scope for a "prevailing party, *other than* the United States," in Section 14 of the VRA. 52 U.S.C. § 10310(e) (emphasis added). Clearly, the possibility of Attorney General enforcement was not intended to foreclose private actions.

Second, the legislative history and context around Section 202 also support finding a private right of action. Congress's expressly declared purpose in enacting Section 202 was not only to provide absentee balloting opportunities in presidential elections, but also "to enable citizens to better obtain the enjoyment of such rights." 52 U.S.C. § 10502(b). If the enforcement of Section 202 was limited to suits by the Attorney General, the statute would do nothing to "*enable* citizens to better obtain" their rights—they would be left to rely on the Attorney General. *Id*. (emphasis added). Similarly, the legislative history around Section 3 made clear that Congress intended to ratify the Supreme Court's recognition of private rights of action to vindicate other claims under the VRA. *Morse*, 517 U.S. at 232; *see also Talevski*, 599 U.S. at 178 ("Congress's failure to displace *firmly rooted* common-law principles generally indicates that it incorporated those established principles"). Specifically, the Senate Report accompanying the addition of the "aggrieved person" language to Section 3 stated: "The Committee concludes that it is sound policy to authorize private remedies to assist the process of enforcing voting rights." *Morse*, 517 U.S. at 233 n.45 (citing S. Rep. No. 94-295 at 40 (1975)).

In the face of clear statutory text and supporting legislative history, SEB Defendants invoke out-of-circuit precedent. Br. at 17–20 (citing *Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204 (8th Cir. 2023)). But the Eighth Circuit's overly narrow reading of the VRA's enforcement provisions was centrally

based on a dissenting opinion's interpretation, rather than the lead opinion's reading of the plain text enacted by Congress. *Ark. State Conf. NAACP*, 86 F.4th at 1211 (citing *Morse*, 517 U.S. at 289 (Thomas, J., dissenting)). In relying on the dissent, the Eighth Circuit ignored the Supreme Court's holding, which was that "Congress *must* have intended it to provide private remedies" when it added language about "aggrieved person[s]" to Section 3. *Morse*, 517 U.S. at 233–34 (emphasis added).[4]

Further, SEB Defendants' attempt to stretch this single case into a trend is built on multiple misrepresentations. For example, SEB Defendants claim that "the Supreme Court could not have been clearer that courts should not imply private rights of action." Br. at 20 (citing *Egbert v. Boule*, 596 U.S. 482, 491–92 (2022)). But the Supreme Court made that statement in the context of implied *constitutional claims* against the federal government under the *Bivens* doctrine. *Egbert*, 596 U.S. at 490–92. Indeed, in saying so, the Supreme Court expressly distinguished such judicially created remedies from statutory claims, like those raised here. *Id.* ("[C]reating a cause of action is a legislative endeavor.").

Similarly, SEB Defendants are simply wrong to say, "this section of the VRA has not been invoked previously by private parties in litigation." Br. at 17. In fact, it

[4] In *Morse*, the three concurring justices joined the holding that "Congress must be taken to have intended to authorize a private right of action to enforce § 10 of the Act." 517 U.S. at 240 (Breyer, J., concurring).

has been invoked by private parties and vindicated by courts several times.[5] *See, e.g.*, *Prigmore v. Renfro*, 356 F. Supp. 427, 433 (N.D. Ala. 1972), *aff'd*, 410 U.S. 919 (1973) (in suit brought by private litigants, enforcing Section 202's requirement that absentee voting in presidential elections be available to voters absent on election day); *Hershcopf v. Lomenzo*, 350 F. Supp. 156, 157–59 (S.D.N.Y. 1972) (in private suit, enforcing Section 202(d)'s guarantee that absentee ballots in presidential elections be counted if returned by close of polls); *see also Bishop v. Lomenzo*, 350 F. Supp. 576, 585–87 (E.D.N.Y. 1972) (in private suit, finding a state's refusal to permit registration up to "the thirtieth day immediately prior to a Presidential election . . . is in direct contravention of § 202(d) of the [VRA]"); *Project Vote v. Madison Cnty. Bd. of Elections*, No. 1:08CV2266JG, 2008 WL 4445176, at *10–11 (N.D. Ohio Sept. 29, 2008) (in private suit, finding plaintiffs are likely to succeed on their claim that a requirement to register more than 30 days before an election violated Section 202(d)). The infrequency of these cases merely speaks to the trend of states complying with Section 202(d)—a trend that Georgia followed until recently.

CONCLUSION

For these reasons, this Court should deny SEB Defendants' motion to dismiss.

[5] Section 202 of the VRA was formerly cited as 42 U.S.C. § 1973aa-1.

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Respectfully submitted,

Adam M. Sparks
Georgia Bar No. 341578
Anré D. Washington
Georgia Bar No. 351623
KREVOLIN & HORST, LLC
1201 W. Peachtree St., NW
3250 One Atlantic Center
Atlanta, GA 30309
Tel: (404) 888-9700
Fax: (404) 888-9577
Email: sparks@khlawfirm.com
Email: washington@khlawfirm.com

/s/ Uzoma N. Nkwonta
Uzoma N. Nkwonta*
Justin Baxenberg*
William K. Hancock*
Marcos Mocine-McQueen*
ELIAS LAW GROUP LLP
250 Massachusetts Ave NW, Ste 400
Washington, D.C. 20001
Telephone: (202) 968-4490
Facsimile: (202) 968-4498
unkwonta@elias.law
jbaxenberg@elias.law
whancock@elias.law
mmcqueen@elias.law

Counsel for Plaintiff International Alliance of Theater Stage Employees Local 927

*Admitted *Pro Hac Vice*

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with Local Rule 5.1(C) because it is prepared in Times New Roman font at size 14.

Dated: February 26, 2024

Uzoma N. Nkwonta
Counsel for Plaintiff