UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

INTERNATIONAL ALLIANCE OF THEATER STAGE EMPLOYEES LOCAL 927, *Plaintiff*, v. JOHN FERVIER, et al., *Defendants*, REPUBLICAN NATIONAL COMMITTEE; and GEORGIA REPUBLICAN PARTY, INC., *Intervenor-Defendants*.	No. 1:23-cv-04929-JPB

INTERVENORS' RESPONSE TO BRIEF OF THE UNITED STATES

The Department of Justice's brief makes the same mistakes that the Plaintiff's brief makes. It reads *Oregon v. Mitchell*—an original action that split the Court half a dozen ways—to resolve the constitutionality of an entire federal statute. It reads the Electors Clause—a narrow provision that gives Congress power over the "Time" of presidential elections—to give Congress power over *all* aspects of presidential elections. And it reads Congress's power to enact remedial legislation—a power that requires detailed congressional evidence—to permit preemption of a whole sector of state laws, with no evidence at all. Lacking authority, the DOJ relies on single-Justice opinions,

expansive readings, and hidden holdings. This Court should reject that approach.

I. The Supreme Court could not have resolved the constitutionality of a statutory provision that it has never applied.

The DOJ begins its argument with a contradiction. It claims that the "Supreme Court has unequivocally held that Section 202 is constitutional." DOJ Br. (Doc. 104) at 6. But in the very next sentence, the DOJ admits that in "*Oregon v. Mitchell*, the Court adjudicated … *portions* of the 1970 VRA Amendments." *Id.* (emphasis added). Both claims cannot be true. If the Supreme Court did not "adjudicate[]" all of Section 202, it did not "uphold" all of Section 202. *Id.* at 8 n.3. And this case concerns a Section 202 provision that the Supreme Court did not adjudicate.

Federal courts don't—and can't—declare unchallenged provisions lawful. The "judicial Power of the United States" "extend[s]" to resolving "Cases" and "Controversies." U.S. Const. art. III, §§1, 2. "[T]he power exercised is that of ascertaining and declaring the law applicable to the controversy." *Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923). In other words, "a judicial Power is one to render dispositive judgments." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (cleaned up). The judicial power thus "permits a court to decline to enforce a statute in a particular case or controversy, and it permits a court to enjoin executive officials from taking steps to enforce a statute." Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev. 933, 936 (2018) (footnote omitted). But the judicial power "does not give the federal courts a preclearance power over state or federal laws." *Id.* at 939. So when a

federal court reviews the constitutionality of a federal law, its power "amounts to little more than the negative power to disregard an unconstitutional enactment." *Id.* at 936. The power does not permit a federal court to insulate a statute from legal challenges not raised in that case.

The DOJ disregards these principles. Its refrain that *Oregon v. Mitchell* "upheld *all* of Section 202," DOJ Br. 6, ignores that an opinion's holding is necessarily limited by the scope of the judgment. *See Oklahoma v. Texas*, 272 U.S. 21, 42-43 (1926) (The scope of a judgment "is not to be determined by isolated passages in the opinion considering the rights of the parties, but upon an examination of the issues made and intended to be submitted, and which it was intended to decide."). The DOJ also argues that "the Court's judgment on its face applies to all of Section 202's absentee ballot requirements." DOJ Br. 7. But that flouts the rule that "[e]very decree in a suit in equity must be considered in connection with the pleadings, and, if its language is broader than is required, it will be limited by construction so that its effect shall be such, and such only, as is needed for the purposes of the case that has been made and the issues that have been decided." *City of Vicksburg v. Henson*, 231 U.S. 259, 269 (1913) (citation omitted).

In other words, the Supreme Court could no more hold "that Section 202 is constitutional," DOJ Br. 6, than this Court could hold in this case that Georgia's entire election code is constitutional. The scope of this Court's judgment is necessarily limited to the absentee-application provision challenged in this case. *See* Ga. Code §21-2-381(a)(1)(A). So, too, the scope of *Oregon v. Mitchell* is limited to the Section 202 provisions actually challenged

in that case. *See City of Vicksburg*, 231 U.S. at 269. And that opinion, when "considered in connection with the pleadings," *id.*, makes clear that the Supreme Court did not resolve the constitutionality of the absentee-application deadline in the Voting Rights Act. The provision simply wasn't at issue in that case.

The DOJ resists this conclusion by pointing to *other provisions* that were at issue in *Oregon v. Mitchell*. It points out that "Eight Justices upheld Section 202, 'concurring in the judgment' that 'Congress can set residency requirements and provide for absentee balloting in elections for presidential and vice-presidential electors.'" DOJ Br. 6 (cleaned up). That's true, but irrelevant. The question here is the constitutionality of the absentee-*application* provision, which is a distinct requirement in Section 202. The DOJ doesn't dispute that three of the States in the case—Oregon, Texas, and Arizona—did not raise the constitutionality of Section 202's absentee-application provision. And when the DOJ examines Idaho's "pleadings" as required, *City of Vicksburg*, 231 U.S. at 269, it's forced to concede "the lack of an across-the-board absentee ballot application deadline in Idaho," DOJ Br. 8. That concession nullifies the DOJ's argument. If Idaho didn't have an "application deadline," *id.*, then no Idaho law could conflict with Section 202's application deadline, and thus the Court couldn't have resolved the constitutionality of that federal provision. *See City of Vicksburg*, 231 U.S. at 269; *Mellon*, 262 U.S. at 488.

Recognizing that its concession would give away the argument, the DOJ invents a law that Idaho didn't have. The DOJ argues that Idaho had an

implicit absentee-application deadline because it required "[n]ew residents" who wished to vote in presidential elections to register at least ten days before the election. DOJ Br. 8. But that durational residency requirement was challenged under a separate Section 202 provision that had nothing to do with absentee voting or absentee applications. *Mitchell*, 400 U.S. at 147 (op. of Douglas, J.). The Court ruled that Congress had power to prohibit durational-residency requirements for presidential elections. *Id.* That ruling put all Idaho voters on equal footing: any qualifying voter could vote for president by absentee ballot by filing an "application to be made at any time." *Id.* at 239 n.19 (Brennan, J., concurring). The DOJ even acknowledges that those registration rules did not apply to all Idaho voters. *See* DOJ Br. 9 (argument applies "for new residents at least"). Even under the DOJ's expansive reading of the case, the Supreme Court did not address the application of Section 202 at issue here: a universal absentee-application deadline that applies to all voters in the State.

Any doubt that Idaho law didn't conflict with Section 202 is removed by the absentee-application deadline that Idaho had on the books. As Justice Brennan pointed out, Idaho had passed a law that would become "effective January 1, 1971," after *Oregon v. Mitchell* was litigated and decided. *Mitchell*, 400 U.S. at 239 n.19 (Brennan, J., concurring). Even if that law had been at issue, it wouldn't have conflicted with Section 202's seven-day deadline because it allowed absentee applications to "be made up to 5 p.m. the day before the election." An Act Defining General Election, ch. 140, §163, 1970 Idaho Laws 351, 407. That law did not change any existing deadlines—it created a new

deadline where none had been. *See Mitchell*, 400 U.S. at 239 n.19 (Brennan, J., concurring). At the time of *Oregon v. Mitchell*, Idaho had no absentee-ballot application deadline for any voter.

In sum, the DOJ can't escape the fact that Idaho's case did not challenge a state law that conflicted with Section 202's absentee-application provision. The DOJ all but acknowledges that fact, as it can't point to any Idaho law that would have been enjoined under Section 202's absentee-application provision. That's because no Idaho deadline existed at that time. And the Supreme Court couldn't have applied Section 202's absentee-application deadline to preempt a state law that didn't exist.

For these reasons, the absentee-application provision's constitutionality is a first-impression issue. And contrary to the DOJ's suggestion, DOJ Br. 11, this Court can't just reflexively extend the plurality reasoning in *Oregon v. Mitchell* to that first-impression issue. Fifty years of subsequent precedent bear on whether the provision is a valid exercise of congressional authority, and "a rule of federal law, once announced and applied to the parties to the controversy, must be given full retroactive effect by all courts adjudicating federal law." *Harper v. Va. Dep't of Tax'n*, 509 U.S. 86, 96 (1993). Under current precedent, Section 202's absentee-application deadline is unconstitutional.

II. The absentee-application provision doesn't fall within any of Congress's enumerated powers.

The Justices in *Oregon v. Mitchell* could not agree which constitutional powers justified which portions of Voting Rights Act amendments. Some portions they upheld, and others they didn't. The DOJ and the Plaintiff reenact that disagreement. Just as the Justices couldn't agree on the proper

constitutional provision, neither can the DOJ and the Plaintiff. They try a variety of different theories. But under current Supreme Court precedent, none hold up.

A. Article II cannot support Section 202's absentee-application provision.

The DOJ begins with a theory that only one Justice in *Oregon v. Mitchell* endorsed. DOJ Br. 13-16. The DOJ repeats Justice Black's view that the Electors Clause gives Congress broad authority to set rules that pertain to presidential elections. *See Mitchell*, 400 U.S. at 124, 134 (op. of Black, J.). But a majority of the Court rejected the view that Congress could have enacted Section 202 under the Electors Clause. The DOJ buttresses its reliance on Justice Black's idiosyncratic theory by pointing out that "only Justice Harlan expressly rejected Justice Black's rationale," and the "other Justices did not opine on the issue." *Id.* at 16 n.4. But the Court "implicitly rejected those arguments" by ignoring them. *Clemons v. Mississippi*, 494 U.S. 738, 747 n.3 (1990). And in any event, the DOJ's approach conflicts with the Court's instructions that silence *should not* be treated as a decision by the Court, *Mandel v. Bradley*, 432 U.S. 173, 176 (1977), and its instruction that only the narrowest view actually endorsed by five Justices is controlling, *Marks v. United States*, 430 U.S. 188, 193 (1977). This Court should not rely on an expansive constitutional theory rejected by eight Justices.

Even the Plaintiff in this case doesn't rely on the Electors Clause. *See generally* Pl. Resp. Br. (Doc. 92). For good reason: the Electors Clause gives Congress authority only to "determine the Time of chusing the Electors, and the Day on which they shall give their Votes." U.S. Const. art II, §1. Power over

the "Manner" of presidential elections is left to the state legislatures. *Id.* And "the state legislature's power to select the manner for appointing electors is plenary." *Bush v. Gore*, 531 U.S. 98, 104 (2000).

Absentee-voting rules are classic "manner" regulations. Section 202's seven-day absentee-application deadline does not regulate the "Time of chusing the Electors." U.S. Const. art II, §1. It concerns the time of submitting an *application* that would permit a voter to vote by mail. The DOJ relies on several cases that concern the scope of Congress's power to set a national "election day." 3 U.S.C. §1. But all of those cases concerned the "Time" of the *day for the election*. *See Foster v. Love*, 522 U.S. 67, 71 (1997); See *Voting Integrity Project, Inc. v. Keisling*, 259 F.3d 1169, 1175 (9th Cir. 2001); *Millsaps v. Thompson*, 259 F.3d 535, 544-545 (6th Cir. 2001); *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 776-777 (5th Cir. 2000); *Harris v. Fla. Elections Canvassing Comm'n*, 122 F. Supp. 2d 1317, 1324 (N.D. Fla.), *aff'd*, 235 F.3d 578 (11th Cir. 2000). None of those cases held that a rule about when absentee-voting applications are due is *itself* a regulation of the "Time of chusing the Electors." U.S. Const. art II, §1. Instead, those cases show the Electors Clause means what is says: Congress's "power to control the 'Manner'" of elections does not extend "to the selection of presidential electors." *Mitchell*, 400 U.S. at 211-12 (Harlan, J., concurring in part and dissenting in part). And Section 202's seven-day absentee-application deadline can't be read as anything other than a "manner" regulation.

Finally, the DOJ "resorts to the last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause." *Printz v. United*

States, 521 U.S. 898, 923 (1997). The DOJ argues that even if Section 202's absentee-application deadline isn't itself a regulation of the "the "Time of chusing the Electors," U.S. Const. art. II, §1, it is at least "necessary and proper" to the execution of that power, *id.* art. I, §8. *See* DOJ Br. 14-16. That argument fails for two reasons.

First, only Justice Black would have upheld provisions of Section 202 under "the power of Congress to make election regulations in national elections" as "augmented by the Necessary and Proper Clause." *Mitchell*, 400 U.S. at 120 (op. of Black, J.). If upholding presidential-elections legislation were as simple as invoking the Necessary and Proper Clause, Justice Black would not have been alone.

Second, the Necessary and Proper Clause does not license Congress to subvert the constitutional authorities left to the States. When a law "violates the principle of state sovereignty reflected in the various constitutional provisions … it is not a 'Law *proper* for carrying into Execution'" Congress's enumerated powers. *Printz*, 521 U.S. at 923-24 (cleaned up). State legislatures have "plenary" power over "the manner" of presidential elections, *Bush*, 531 U.S. at 104; U.S. Const. art II, §1. Absentee voting is a *method* of voting—or in the words of Constitution, a "Manner" of voting. U.S. Const. art II, §1. The DOJ doesn't dispute that premise. State legislatures thus have plenary power to determine who can vote by absentee ballot and how they qualify. *See Arizona v. Inter Tribal Council of Ariz., Inc.*, 570 U.S. 1, 16 (2013) ("Arizona is correct that the Elections Clause empowers Congress to regulate *how* federal elections are held, but not *who* may vote in them.").

The time to apply to receive an absentee ballot thus falls squarely within the State's plenary power to regulate the "Manner" of presidential elections. So even if the DOJ were correct that Section 202's absentee-application deadline bore some rational relationship to the "Time of chusing the Electors," *id.*, it must also show that it does not infringe other constitutional provisions. *See United States v. Comstock*, 560 U.S. 126, 135 (2010) ("[A] federal statute, in addition to being authorized by Art. I, § 8, must also 'not [be] prohibited' by the Constitution." (citation omitted)); *see also New York v. United States*, 505 U.S. 144, 166 (1992) ("We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts."). Because an absentee-application deadline is at the heart of the States' plenary power over the "Manner" of presidential elections, Congress lacks authority under the Electors Clause to preempt States' absentee-application deadline. *See Inter Tribal Council of Ariz.*, 570 U.S. at 16 ("One cannot read the Elections Clause as treating implicitly what these other constitutional provisions regulate explicitly.").

B. Congress does not have limitless power over presidential elections.

The DOJ next argues that "Congress has the power to enact legislation to preserve the national government." DOJ Br. 17-19. The DOJ doesn't pin down *where* in the Constitution this undefined power resides, let alone explain how state regulations of the manner of choosing presidential electors threaten the national government even though the Constitution grants that power to the States. The DOJ relies on some combination of the "Elections Clause,"

"Article II," the "Necessary and Proper Clause," and various "precedents," but the DOJ avoids quoting the Constitution itself. *Id.* In the end, the argument just repackages Justice Black's solo view that the Constitution gives Congress broad power over presidential elections. *Mitchell*, 400 U.S. at 124 (op. of Black, J.). And the other precedents the DOJ relies on don't support a limitless power over presidential elections.

Start with *Burroughs v. United States*, 290 U.S. 534 (1934). Justice Black also relied on *Burroughs*, but he wasn't able to convince anyone else of his reading. *Mitchell*, 400 U.S. at 149-50 (op. of Black, J.) (citing *Burroughs*, 290 U.S. at 547). That's because *Burroughs* did not concern Congress's power to enact legislation under the Electors Clause. Rather, in *Burroughs* the Court held that the Federal Corrupt Practices Act did not *violate* the Electors Clause because "[n]either in purpose nor in effect does [the act] interfere with the power of a state to appoint electors or the manner in which their appointment shall be made." 290 U.S. at 544. That was because the Federal Corrupt Practices Act set rules governing political campaign contributions—it had nothing to do with the appointment of presidential electors. *Id.* at 540-43. Indeed, *Burroughs* rests on the premise that if the statute did interfere with the "exclusive state power" over presidential elections, it would be unconstitutional. *Id.* at 544-45. The DOJ cites several circuit cases that reference Justice Black's mistaken view of *Burroughs*. *See* DOJ Br. 17. But even if those cases were binding on this court, none considered Congress's limited powers under the Electors Clause. *E.g.*, *Voting Rts. Coal. v. Wilson*, 60 F.3d 1411, 1413 (9th Cir. 1995) (evaluating the constitutionality of the

National Voter Registration Act under "[t]hree provisions of the Constitution": the Elections Clause (Art. I, §4), the Qualifications Clause (Art. I, §2), and the Tenth Amendment).

The DOJ next relies on *Ex parte Yarbrough*, 110 U.S. 651 (1884). Justice Black relied on that one, too. *Mitchell*, 400 U.S. at 139 (op. of Black, J.) (citing *Yarbrough*, 110 U.S. at 651). But as Justice Harlan pointed out, "[w]hile the right of qualified electors to cast their ballots and to have their votes counted was held to be a privilege of citizenship in *Ex parte Yarbrough* and *United States v. Classic*, these decisions were careful to observe that it remained with the States to determine the class of qualified voters." *Id.* at 213-14 (citations omitted). The DOJ also relies on *Inter Tribal Council*, but that case addressed the "grant of congressional power" found in the *Elections* Clause, which gives Congress power to "supplant" state laws regulating the manner of *congressional* elections. 570 U.S. at 8. None of these cases resolved the scope of Congress's power to supplant state laws regulating the manner of *presidential* elections under the Electors Clause. This Court should reject the DOJ's argument that "it's in there somewhere."

C. The right to interstate travel can't support the absentee-application provision.

The DOJ largely repeats the same arguments the Plaintiff makes invoking the right to interstate travel. The intervenors have already responded to those arguments in detail. *See* Interv. Reply Br. (Doc. 93) at 5-13. But it bears repeating that the DOJ can't get by relying on cases that address whether certain state laws *violate* the constitutional right to interstate travel. *E.g.*, *Saenz v. Roe*, 526 U.S. 489, 500 (1999); *Shapiro v. Thompson*, 394 U.S.

618, 630 (1969); *Attorney Gen. of N.Y. v. Soto-Lopez*, 476 U.S. 898, 903 (1986). Instead, the DOJ must point Congress's *power* to enact legislation that enforces the right to interstate travel. And to the extent Congress passed Section 202 to enforce the right to interstate travel, it must satisfy the *Boerne v. Flores* test. 521 U.S. 507, 518 (1997) ("Legislation which deters or remedies constitutional violations can fall within the sweep of Congress' enforcement power even if in the process it prohibits conduct which is not itself unconstitutional and intrudes into 'legislative spheres of autonomy previously reserved to the States.'" (citation omitted)). The DOJ comes up with nothing more than the oft-recycled statement of Senator Goldwater. *See* DOJ Br. 22-23. Given the "lack of support in the legislative record," *Boerne*, 521 U.S. at 531, and the other flaws with Section 202's absentee-application provision, *see* Interv. Reply Br. 6-10, the provision cannot be considered an "appropriate" exercise of Congress's power to remedy violations of the right to interstate travel, U.S. Const. amend. XIV, §5.

D. The right to vote can't support the absentee-application provision.

The DOJ relies on the final catch-all in election regulation: the right to vote.[1] This argument fails at the outset because the deadline at issue governs the timely receipt of absentee-ballot applications. "It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots"

[1] The DOJ discusses the right to vote as a right under the "First and Fourteenth Amendment[s]," DOJ Br. 25, and the Privileges or Immunities Clause, *id.* at 29-30. But Congress's power to protect that right through remedial legislation is the same, regardless of the source of the right. *See Boerne*, 521 U.S. at 519. "The Congress shall have power to enforce, by appropriate legislation, the provisions of [the Fourteenth Amendment]." U.S. Const. amend. XIV, §5.

according to the Plaintiff's preferences. *McDonald v. Bd. of Election Comm'rs of Chi.*, 394 U.S. 802, 807 (1969). "In *McDonald v. Board of Election Commissioners of Chicago*, the Supreme Court told us that the fundamental right to vote does not extend to a claimed right to cast an absentee ballot by mail." *Tully v. Okeson*, 977 F.3d 608, 611 (7th Cir. 2020) (citing *McDonald*, 394 U.S. at 807). Hence, "[a]s other courts have stated, 'as long as the state allows voting in person, there is no constitutional right to vote by mail.'" *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 607 (8th Cir. 2020) (quoting *Common Cause Ind. v. Lawson*, 977 F.3d 663, 664 (7th Cir. 2020)); *Memphis A. Philip Randolph Inst. v. Hargett*, 2 F.4th 548, 563 (6th Cir. 2021) (Readler, J., concurring) ("There is no constitutional right to vote absentee."). The deadline the Plaintiff challenges isn't even an absentee ballot deadline. It's an absentee-*application* deadline. It does not trigger the right to vote.

Even if the Court were to set aside the absentee-voting distinction, Congress did not support the right to vote with proper record evidence. The DOJ points out that Congress "found" that "the lack of sufficient opportunities for absentee registration … has the effect of denying to citizens the equality of civil rights." DOJ Br. 25 (quoting 52 U.S.C. §§10502(a)(1) and (a)(5)). But Congress can't just assert findings—it must "support" those findings with evidence "in the legislative record." *Boerne*, 521 U.S. at 530. RFRA contained similar findings about free exercise rights, *See* 42 U.S.C. §2000bb, but the Court concluded those findings fell short because "RFRA's legislative record lacks examples of modern instances of generally applicable laws passed because of religious bigotry," *Boerne*, 521 U.S. at 530.

Trump v. Anderson confirms these principles. 601 U.S. 100 (2024). The DOJ plucks out-of-context quotes about the importance of presidential elections. *See* DOJ Br. at 27-28 (quoting *Trump*, 601 U.S. at 112-16). But those quotes concerned the power of *States* to unilaterally remove a presidential candidate from the ballot under the Fourteenth Amendment's Disqualification Clause. *See Trump*, 601 U.S. at 112-16. They have nothing to do with *Congress's power* to preempt valid State legislation under the Enforcement Clause.

Rather, in *Trump v. Anderson*, the Court reiterated that "Section 5 is strictly 'remedial.'" *Id.* at 115. But the only "data" the DOJ cites confirms there was nothing for Congress to remedy. The DOJ admits that "only 13 states had absentee ballot request deadlines more than seven days before the election." DOJ Br. 27 (citing 116 Cong. Rec. at 6991). According to the DOJ, that almost all States already complied with Congress's absentee-application deadline shows that an earlier deadline was not "necessary for administrative feasibility or fraud prevention." *Id.* But that's not the proper test. Section 5 does not turn on the *burden* to States of complying with Congress's law. Instead, the "appropriateness of remedial measures must be considered in light of the evil presented." *Boerne*, 521 U.S. at 530. By recognizing that Congress was *at most* remedying the evils of "only 13 states," DOJ. Br. 27, the DOJ concedes that Congress needs an exceedingly persuasive justification for preempting *all* state absentee-application provisions. The congressional record is bare of any other evidence.

CONCLUSION

The Court should grant the motions to dismiss.

Dated: August 5, 2024

Respectfully submitted,

/s/ Alex Kaufman

Thomas R. McCarthy*
Gilbert C. Dickey*
Conor D. Woodfin*
CONSOVOY MCCARTHY PLLC
1600 Wilson Boulevard
Suite 700
Arlington, VA 22209
(703) 243-9423
tom@consovoymccarthy.com
gilbert@consovoymccarthy.com
conor@consovoymccarthy.com

Alex B. Kaufman
GA BAR 13607
CHALMERS, ADAMS, BACKER & KAUFMAN, LLC
11770 Haynes Bridge Road
#205-219
Alpharetta, GA 30009-1968
(404) 964-5587
akaufman@chalmersadams.com

*admitted *pro hac vice*

Counsel for Intervenors

CERTIFICATE OF COMPLIANCE

This document complies with Local Rule 5.1(B) because it uses 13-point Century Schoolbook.

/s/ Alex Kaufman

CERTIFICATE OF SERVICE

On August 5, 2024, I e-filed this document on ECF, which will email everyone requiring service.

/s/ Alex Kaufman