IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

INTERNATIONAL ALLIANCE OF THEATER STAGE EMPLOYEES LOCAL 927,

Plaintiff,

v.

JOHN FERVIER, in his official capacity as member of the Georgia State Election Board, *et al.*,

Defendants.

Civil Action No.:
1:23-CV-04929-LMM

STATE DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS AMENDED COMPLAINT

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INTRODUCTION

As State Defendants explained in their motion to dismiss, as part of its update of state voting laws in SB 202, the General Assembly changed the deadline by which a voter must request an absentee ballot if she wishes to submit such a ballot by mail. Plaintiff does not dispute that, in so doing, the General Assembly preserved Georgia voters' ability under state law to cast an absentee ballot *in person* until the Friday before Election Day. O.C.G.A. § 21-2-385(d)(1). Nor does Plaintiff dispute that, by requiring absentee-*by-mail* applications to be submitted at least eleven days before Election Day, the General Assembly ensured there would be sufficient time for the ballots to be mailed and for county election officials to process such applications before preparing for Election Day.

Despite this sensible change, which brings Georgia in line with many other states that require voters to submit absentee-ballot applications more than seven days before Election Day, Plaintiff asks this Court to enjoin that provision because, in Plaintiff's estimation, it conflicts with § 202(d) of the Voting Rights Act ("VRA"), 52 U.S.C. § 10502(d). As Plaintiff sees it, the VRA requires states to allow applications for absentee-*by-mail* ballots to be submitted until seven days before Election Day, not eleven days. The fact that no private party nor the U.S. Department of Justice has ever challenged one of the many state laws requiring such applications to be submitted earlier

suggests that Plaintiff is incorrect on the merits.

But the Court need not reach that question because, as State Defendants have already shown, Plaintiff lacks both standing and a private right of action. On each question, Plaintiff's only response is to ask this Court to ignore binding authority from the Eleventh Circuit and the Supreme Court. But the Court cannot follow Plaintiff's invitation to ignore that authority. Rather, the Court should dismiss Plaintiff's Amended Complaint.

ARGUMENT

Plaintiff's attempt to demonstrate standing fails because Plaintiff relies exclusively on speculative injury and untenable theories of traceability and redressability. Alternatively, the Court must dismiss Plaintiff's lone VRA claim because neither § 202(d) nor 42 U.S.C. § 1983 permits a private right of action.

I. Plaintiff Lacks Standing.

Plaintiff does not dispute that, when a plaintiff claims organizational standing, the Eleventh Circuit requires that the "organization must 'make specific allegations establishing that at least one identified member ha[s] suffered or [will] suffer harm.'" *Ga. Republican Party v. SEC*, 888 F.3d 1198, 1203 (11th Cir. 2018) ("*GRP*") (citation omitted). But Plaintiff has not done

so.[1] In fact, Plaintiff devotes substantial portions of its opposition to arguing that it need not do so. But Plaintiff is wrong on the law, and the Court should reject Plaintiff's view that rank speculation suffices to establish an injury. And Plaintiff's efforts (Opp'n at 12–14 [Doc. 69]) to show traceability and redressability fail because State Defendants "didn't do (or fail to do) anything that contributed to [Plaintiff's] harm." *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1301 (11th Cir. 2019) (en banc).

A. Plaintiff Fails to Adequately Allege an Injury.

As State Defendants showed (Mot. to Dismiss at 4–11 [Doc. 68]), Plaintiff's attempt to identify an injury suffers from numerous shortcomings. The most obvious is Plaintiff's continued inability to articulate how *any* member is harmed by the challenged provision of SB 202. Even with Plaintiff's opposition in hand, the Court will struggle to discern what Plaintiff alleges to

[1] Plaintiff also has not shown this suit is germane to its purpose. *See* Mot. at 5 & n.1; *see also Drummond v. Zimmerman*, 454 F. Supp. 3d 1210, 1221 (S.D. Fla. 2020) (because HOA was not "a disability advocacy group," it could not assert ADA claims on behalf of its members). Plaintiff's mere assertion (at 15–17) that protecting the voting rights of its members is germane to IATSE's core mission is "scanty information" at best. *Ne. Ohio Coal. for Homeless & Serv. Emps. Int'l Union v. Blackwell*, 467 F.3d 999, 1010 (6th Cir. 2006). In fact, Plaintiff's only citations (at 15–16) did not analyze germaneness at all. *See Diaz v. Cobb*, 541 F. Supp. 2d 1319, 1322 n.3 (S.D. Fla. 2008) (expressly assuming standing without analyzing it); *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004) (citing germaneness standard but not analyzing it). This is further reason to conclude that Plaintiff lacks standing.

be the harm. Is it that Plaintiff's members are being deprived of the right to "vot[e] by mail"? Opp'n at 5. That can't be it, as neither Plaintiff's amended complaint nor its opposition squarely alleges that VRA § 202(d) can only be satisfied through absentee voting *by mail*. Mot. at 7. Or is Plaintiff's theory that certain members will be called out of state after SB 202's eleven-day deadline but before what they claim is the VRA's seven-day deadline? Opp'n at 6. Again, that can't be it, as Plaintiff fails to allege any likelihood that this will occur or that any such member will have *any* difficulty voting by absentee ballot. Or is Plaintiff's theory that its members are harmed because they will be out of State for months at a time? *Id.* at 8. That also can't be the theory because Plaintiff fails to allege that such theater employees would be unable to vote by absentee ballot during those months away from the State.

Plaintiff's alleged harm thus remains a mystery, and its attempt to confuse the issue will not suffice—as the Eleventh Circuit requires more than "conclusory statements" about a plaintiff's "fears of hypothetical future harm[.]" *Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 924, 926 (11th Cir. 2020) (en banc) (cleaned up).[2] Plaintiff has therefore failed to satisfy its burden of demonstrating standing, and its arguments to the contrary fail.

First, contrary to Plaintiff's assertion, State Defendants do not "attempt

[2] Even if Plaintiff had settled on one of these theories of harm, none is supported by factual allegations, and none shows harm.

to raise the bar for cognizable injuries." Opp'n at 4. Rather, State Defendants faithfully apply the Eleventh Circuit's clear requirement that *Plaintiff* must allege more than the mere possibility of harm. *Muransky*, 979 F.3d at 927.

The Eleventh Circuit's decision in *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351–52 (11th Cir. 2009), is not to the contrary. In *Billups*, the Eleventh Circuit held that two *individual* voters who lacked photo ID required to vote had standing because "requiring them to obtain a photo identification is a denial of equal treatment" compared to voters who already had photo IDs. 554 F.3d at 1351. But here, Georgia law does not "erect[] a barrier that makes it more difficult for members of one group to [vote] than it is for members of another group[.]" *Id.* (citation omitted). Georgia's absentee-voting deadlines apply equally to all voters who may be out of state on Election Day. And Plaintiff has not explained how the challenged provision will make voting by absentee ballot more difficult for *any* of its members. *Billups* thus does not support Plaintiff's attempt to rely on a speculative theory of injury.[3]

Billups, moreover, reiterated that injuries must be "concrete, particularized, [and] non-hypothetical[.]" *Id.* (quotation marks omitted). That is fatal to Plaintiff's attempt to avoid dismissal, as Plaintiff baldly claims (at 5)

[3] Plaintiff's reliance (at 9) on *Nielsen v. DeSantis*, 469 F. Supp. 3d 1261 (N.D. Fla. 2020), is also misplaced because standing was found there for *individual* voters who faced imminent injury, not an organization that failed to identify any affected voter. *Id.* at 1266.

that injury "is almost certain to occur" while refusing to identify—as it must—any *actual* obstacle to its members' voting by absentee ballot.

Second, Plaintiff's standing argument is foreclosed by the Eleventh Circuit's decision in *GRP*, which requires Plaintiff to "'make specific allegations establishing that at least one identified member ha[s] suffered or [will] suffer harm.'" 888 F.3d at 1203 (11th Cir. 2018) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009)). As the Eleventh Circuit confirmed: "[S]ince *Browning*, the Supreme Court has rejected probabilistic analysis as a basis for conferring standing." 888 F.3d at 1204 (citing *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1160 (11th Cir. 2008)). Thus, "'[w]hile it is certainly possible … that one individual will' suffer an injury from [the eleven-day deadline], 'that speculation does not suffice.'" *Id.* (quoting *Summers*, 555 U.S. at 499). But Plaintiff offers nothing beyond its speculation.

Plaintiff cannot avoid this authority by pointing instead to a footnote in an unpublished Eleventh Circuit opinion, which states that "for prospective equitable relief, organizational plaintiffs 'need not "name names" to establish standing.'" Opp'n at 9 (quoting *Am. Coll. of Emergency Physicians v. Blue Cross & Blue Shield of Ga.*, 833 F. App'x 235, 240 n.8 (11th Cir. 2020)). State

Defendants never claimed that Plaintiff must *name* affected members.[4] Rather, as State Defendants explained (at 8), the Eleventh Circuit requires Plaintiff to substantiate its speculation about harm. And, if the alleged harm is certain to occur, as Plaintiff suggests, Am. Compl. ¶ 17 [Doc. 62], then Plaintiff should be able to allege the facts of at least one member's experience to confirm that it is relying on more than speculation. Plaintiff has not done so, despite filing two complaints and an opposition to State Defendants' motion to dismiss. That silence speaks volumes.[5]

In any event, the unpublished opinion in *American College of Emergency Physicians* misstates the law in this Circuit. True, the Eleventh Circuit there stated that *GRP* had held that a plaintiff "need not 'name names' to establish standing." 833 F. App'x at 240 n.8 (quoting *GRP*, 888 F.3d at 1204). But that is not what *GRP* held. Rather, that was the *GRP* court's summary of the *plaintiff's* argument, which the *GRP* court rejected. *GRP*, 888 F.3d at 1203–

[4] The Court may ignore Plaintiff's strawman, where it claims (at 4) that State Defendants are requiring Plaintiff to "identify a specific member who was completely deprived of their right to vote[.]" While Plaintiff need not identify a specific member, it must allege facts showing a concrete likelihood of injury. Plaintiff has not done so.

[5] Plaintiff's inability to find an affected member is likely due to its misunderstanding of the law. Plaintiff argues (at 6) that any member "deployed before the VRA's seven-day deadline but after Georgia's eleven-day cutoff" will "lose the opportunity to vote absentee altogether." Not so. Absentee voting—in person—is available for all registered voters during that time. Mot. at 7.

04 (rejecting the plaintiff's argument "that it need not 'name names' to establish standing" because that argument failed to meet the "requirement that an organization name at least one member who can establish an actual or imminent injury."). Applying that binding law here, there can be no dispute that Plaintiff must *at least* identify the factual circumstances of one affected member to substantiate its claim of injury.

Plaintiff's other cited cases (at 9–10) are equally inapposite because they either predate the Eleventh Circuit's *GRP* decision or are out of Circuit. And, contrary to Plaintiff's assertions (at 5–6), *Muransky* and *City of South Miami v. Governor of Florida,* 65 F.4th 631 (11th Cir. 2023), are both binding decisions that *reject* reliance on speculative claims of injury.

Just as the plaintiff in *Muransky* alleged a violation of a statute with nothing more than speculative allegations of harm, Plaintiff primarily relies on its theory that harm *necessarily* follows from the alleged violation of § 202(d).[6] That will not do, as this Court has confirmed when holding that a plaintiff cannot demonstrate standing by pointing to an alleged violation of the

[6] *Compare Muransky*, 979 F.3d at 928 ("A conclusory statement that a statutory violation caused an injury is not enough, so neither is a conclusory statement that a statutory violation caused a risk of injury."), *with* Am. Compl. ¶ 14 ("These IATSE members are entitled under federal law to apply for an absentee ballot until seven days before the presidential election, and Defendants by enforcing Georgia's earlier deadline will deprive these members of that federal right.").

law and asking the Court to assume that an injury will follow. *See Turner v. Moody Bible Inst. of Chi., Inc.*, No. 1:15-cv-03711-LMM, 2016 WL 7839105, at *4 (N.D. Ga. Mar. 9, 2016) ("[T]he mere violation of … statutes, without more, does not confer standing."). Similarly, in *City of South Miami*, the Eleventh Circuit confirmed that injuries must be "certainly impending." 65 F.4th at 638 (quotation marks omitted).[7] Plaintiff's attempt to confine *Muransky* and *City of South Miami* to their facts fails.

Thus, Plaintiff's refusal to include factual allegations of even *one member* who has experienced difficulty voting by absentee ballot since SB 202's enactment confirms that Plaintiff has not carried its burden. *See id.* The same is true of Plaintiff's refusal to include any factual allegations of even one member's experience from before SB 202 that shows voting would be more difficult under SB 202's updated deadline. And it is not the Court's job to scour the complaint to divine a theory of harm.[8] Accordingly, Plaintiff has failed to

[7] There is nothing "certainly impending" about the harm alleged here, considering Plaintiff's contradictory allegations of harm. Plaintiff claims that its members will be harmed because they will "find themselves deployed before the VRA's seven-day deadline but after Georgia's eleven-day cutoff," while simultaneously claiming that its members will be harmed because they "spend months on the road" during early voting. Opp'n at 6, 8.

[8] *See, e.g., Belsito Commc'ns, Inc. v. Decker*, 845 F.3d 13, 22 (1st Cir. 2016) (explaining that "we will not become archeologists, devoting scarce judge-time to dig through the record in the hopes of finding something" showing injury that plaintiff "should have found"); *N.M. Off-Highway Vehicle All. v. U.S. Forest Serv.*, 645 F. App'x 795, 803 (10th Cir. 2016) (holding that the plaintiff

carry its burden of showing injury.

B. Plaintiff's Allegations Do Not Demonstrate Traceability or Redressability.

Even if Plaintiff had sufficiently alleged injury, Plaintiff nonetheless fails to demonstrate traceability or redressability when pointing (at 11–15) to State Defendants' authority to promulgate *regulations* governing absentee-ballot applications.

First, Plaintiff does not deny that the State Election Board does not process absentee-ballot applications. Indeed, the Eleventh Circuit has already confirmed that counties are responsible for processing absentee ballots. *Ga. Republican Party, Inc. v. Sec'y of State for Ga.*, No. 20-14741-RR, 2020 WL 7488181, at *2–3 (11th Cir. Dec. 21, 2020); Mot. at 12. And there is no basis for Plaintiff's attempt to differentiate between a county's duties to process absentee *ballots* and absentee-ballot *applications*. Counties process both. *See* O.C.G.A. §§ 21-2-381(b)(1), 21-2-384(a)(2).

Second, Plaintiff cannot avoid this fact by overreading State Defendants' statutory authority to promulgate regulations related to absentee-ballot applications. Opp'n at 14. State Defendants have no authority to issue regulations inconsistent with Georgia law, nor can they "discipline county

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had not demonstrated standing when the lack of sufficient allegations "asked us [the court] to shoulder its responsibility").

officials who fail to follow SEB directives, including by fining or removing them" where that directive *violates* Georgia law. *See* O.C.G.A. § 21-2-381(e) (only permitting the SEB to issue regulations "for the implementation" of the statute); *id.* § 21-2-33.1(a) (limiting enforcement power to "directing compliance with this chapter"). Thus, Plaintiff's standing argument fails because "it must be the effect of the court's judgment on the defendant—not an absent third party—that redresses the plaintiff's injury." *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1254 (11th Cir. 2020) (emphasis omitted) (quoting *Lewis*, 944 F.3d at 1301 (general authority is insufficient to find traceability)).[9] But an order aimed at State Defendants will not alter the obligations of counties to apply SB 202's deadline for absentee-ballot applications.

Third, Plaintiff's proffered authorities (at 10–12) are readily distinguishable. For instance, *Rose v. Raffensperger* addressed a vote dilution claim that did not involve questions about the role of county election officials. 511 F. Supp. 3d 1340, 1345–47 (N.D. Ga. 2021), *rev'd on other grounds sub nom. Rose v. Sec'y, State of Ga.,* 87 F.4th 469 (11th Cir. 2023). Similarly, in *Vote.org v. Georgia State Election Board*, the court rejected a motion to dismiss

[9] Plaintiff asserts (at 14–15 & n.3) that its decision to sue only Fulton County and State Defendants has no relevance to standing, but it goes to redressability. If the Court enjoined only Fulton County and State Defendants, it would have no effect on Georgia's remaining 158 counties in Georgia because State Defendants could not mandate that counties disobey Georgia law.

in a challenge to a different provision of SB 202, where the court offered no analysis of redressability and traceability in the context of whether State Defendants or county officials were responsible for implementing the challenged provision. 661 F. Supp. 3d 1329, 1337–38 (N.D. Ga. 2023).[10] Finally, as State Defendants explained in their motion (at 15–16), Plaintiff misplaces its reliance on *Fair Fight Action, Inc. v. Raffensperger*, 634 F. Supp. 3d 1128, 1185 (N.D. Ga. 2022). In that case, the Court found traceability to the SEB *only* where "State law explicitly assign[ed] [it] responsibility" and *refused* to find traceability where, as here, the "causal link between Defendants and the voters was broken by the counties' actions." *Id.* at 1188, 1193; *see also Fair Fight Action, Inc. v. Raffensperger*, No. 1:18-CV-5391-SCJ, 2021 WL 9553856, at *25 (N.D. Ga. Mar. 31, 2021) ("Plaintiffs' 'misconduct in overseeing' the rejection of the absentee ballots claims are subject to dismissal for lack of standing in light of the Eleventh Circuit's recent holding in *Jacobson*, 974 F.3d 1256."). Plaintiff ignores entirely *Fair Fight*'s conclusion that any causal link is broken when county officials are entrusted with the relevant decision.

Similarly, Plaintiff cannot avoid the recent decision about traceability issued in the consolidated case challenging portions of SB 202. Mot. at 13–14.

[10] Additionally, *Democratic Party of Georgia, Inc. v. Crittenden*, 347 F. Supp. 3d 1324 (N.D. Ga. 2018), was decided pre-*Jacobson* and is no longer good law. *See Jacobson*, 974 F.3d at 1256.

That holding, where the court concluded that claims about absentee-ballot processing were not traceable to State Defendants, is directly relevant here, and there is no basis to confine it to processing of absentee ballots. Opp'n at 11–12 (discussing *In re Georgia Senate Bill 202*, No. 1:21-mi-55555-JPB, 2023 WL 5334582 (N.D. Ga. Aug. 18, 2023), *appeals docketed*, No. 23-13085 (11th Cir. Sept. 18, 2023) & No. 23-13245 (11th Cir. Oct. 2, 2023)). Plaintiff's only response is to claim (at 12) that *applications* are different because State Defendants have authority to issue regulations regarding those. Although State Defendants issue regulations on many election administration matters, that is no answer to the Eleventh Circuit's decision in *Jacobson*, where the court instructed that the question is whether another party—such as county election officials—may continue implementing the challenged provision despite an injunction directed at State Defendants. 974 F.3d at 1255. Here, Plaintiff has failed to identify anything that would compel counties to process applications differently if the Court were to enjoin State Defendants.

Accordingly, Plaintiff has not identified any way that its members' alleged harm is traceable to State Defendants or redressable by an order against the State Defendants. And for that reason, Plaintiff's Amended Complaint must be dismissed.

II. Plaintiff Has No Private Right of Action.

The Court should also dismiss Plaintiff's claim because there is no

private right of action under either VRA § 202(d) or 42 U.S.C. § 1983. Plaintiff's opposition, which the United States parrots in its Statement of Interest [Doc. 70], fails to show otherwise. Indeed, no private party has ever enforced the seven-day deadline in VRA § 202(d). The statute does not create an individual right to apply for an absentee ballot, and its prohibitions can only be enforced by the U.S. Attorney General.

First, Plaintiff's claim must be dismissed because there is no individual right for Plaintiff to enforce. *See* Mot. at 6, 17. As the Supreme Court explains, although "whether a statutory violation may be enforced through § 1983 is a different inquiry from … whether a private right of action can be implied …, the inquiries overlap in one meaningful respect—in either case it must first be determined whether Congress *intended to create a federal right*." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 274 (2002). Nothing in VRA § 202(d) expressly creates an individual right. Indeed, Plaintiff does not dispute that there is no right to vote absentee. Opp'n at 8. And, because there is no individual right to vote absentee, there cannot be an individual right to something even more attenuated—to *apply* to vote absentee within a certain time frame. Mot. at 6.

Moreover, none of the mostly 1970s-era cases cited by Plaintiff and the United States involved the "not later than seven days" provision of § 202(d) or analyzed whether other clauses of § 202(d) confer a private right. Opp'n at 25; Stmt. of Interest at 13 n.3. Rather, Plaintiff and the United States rely on non-

binding cases where a private right was *assumed*—with no analysis of rights-creating language.[11] But the Court should not follow those decisions, which failed to engage in a rigorous analysis of this key question. Moreover, the fact that a third of states have deadlines longer than seven days but neither Plaintiff nor the United States can identify a single case where the deadline was challenged under the VRA's seven-day deadline weighs heavily against a finding that this VRA provision confers an individual right.

Indeed, as the Supreme Court explains, "[f]or a statute to create private rights, its text must be phrased in terms of the persons benefited," with "rights-creating" language and "an *unmistakable* focus on the benefitted class." *Gonzaga Univ.*, 536 U.S. at 274, 284 (emphasis added). The unmistakable subject of VRA § 202(d) is "each State," with the object of "provid[ing] by law for the casting of absentee ballots." 52 U.S.C. § 10502(d). It does not focus on individuals. Moreover, rather than provide an individual right, 52 U.S.C. § 10502(d) imposes *a duty* on voters to "appl[y] therefor not later than seven days immediately prior" to presidential elections.

The contrast between the text of VRA § 202(d) and the types of statutes cited by the United States is clear. Stmt. of Interest at 7–8. Those statutes

[11] *See, e.g.*, *Prigmore v. Renfro*, 356 F. Supp. 427, 429 (N.D. Ala. 1972), *aff'd mem.*, 410 U.S. 919 (1973); *Project Vote v. Madison Cnty. Bd. of Elections*, No. 1:08-cv-2266JG, 2008 WL 4445176, at *10–11 (N.D. Ohio Sept. 29, 2008).

either make clear from the beginning that they are providing rights to individuals—*e.g.*, 42 U.S.C. § 2000d ("*[n]o person* … shall … be excluded" (emphasis added)); 52 U.S.C. § 10508 ("*[a]ny voter* who requires assistance … may be given assistance" (emphasis added))—or they clearly address individuals as the objects of the provision—*e.g.*, 42 U.S.C. § 12203(a) ("[n]o person shall discriminate *against any individual*" (emphasis added)); 52 U.S.C. § 10301 (no voting standard "shall be imposed … which results in a denial … *of the right of any citizen*" (emphasis added)); 52 U.S.C. § 10307(a) ("No person … shall fail … *to permit any person to vote*" (emphasis added)).

In contrast, § 202(d) never mentions individual rights and does not identify a class. Rather, it gives a "general proscription of certain activities," which the Supreme Court confirms "does not indicate an intent to provide for private rights of action." *California v. Sierra Club*, 451 U.S. 287, 294 (1981); *accord Ark. State Conf. NAACP v. Ark. Bd. of Apportionment*, 86 F.4th 1204, 1209 (8th Cir. 2023) (concluding that it is unclear if 52 U.S.C. § 10301 creates a private right because its text focuses both on the state and individuals). Even if *other parts* of the VRA focus on individuals, § 202(d) does not, and the United States neglects to mention § 202(d)'s focus on general proscriptions for the

state.[12] Accordingly, the text of § 202(d) unmistakably lacks "rights-creating" language that confers individual rights.

Second, because § 202(d) does not create an individual right, it cannot be enforced by private parties on its own terms or through § 1983. *See* Mot. at 16. The United States responds by arguing (at 12) that provisions allowing for enforcement by the Attorney General are far from the "unusually elaborate enforcement provisions" that would preclude any other remedies. But that is not the standard. Here, the statutory text confirms that Congress need not say anything more elaborate to preclude private rights of action than by authorizing the Attorney General repeatedly and directly in the VRA to pursue claims and by not expressly authorizing private suits. *See* 52 U.S.C. §§ 10308 (VRA § 12), 10504 (VRA § 204).

True, the Eleventh Circuit, referencing the materiality provision of the Civil Rights Act that was later amended by the VRA, has found a private remedy as to a different provision of that statute. *Schwier v. Cox*, 340 F.3d 1284, 1296 (11th Cir. 2003). But the Court should not read that conclusion as reaching the specific VRA section Plaintiff relies on here. Indeed, the Eleventh

[12] Plaintiff's reliance on *Health & Hospital Corp. of Marion County v. Talevski* is also misguided because *Talevski* was limited to "whether individual rights *established by a Spending Clause statute* [unlike the VRA] are enforceable through 42 U.S.C. § 1983." 599 U.S. 166, 193 (2023) (Barrett, J., concurring) (emphasis added); *see id.* at 183.

Circuit has recently confirmed that, "when the 'statutory structure provides a discernible enforcement mechanism … [the court] ought not imply a private right of action'" because Congress's "'silence is controlling.'" *Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1295 (11th Cir. 2015) (citations omitted). Here, Congress provided an enforcement mechanism through the Attorney General, and that should end the inquiry.

Indeed, as the Eighth Circuit recently explained in a decision rejecting a private right of action under the VRA, it is "[i]mplausible" that "Congress decided to transform enforcement of 'one of the most substantial' statutes in history by the subtlest of implications … when measured against the explicit enforcement mechanisms found elsewhere in the [VRA]." *Ark. State Conf.*, 86 F.4th at 1211–13 & n.4. Indeed, neither 52 U.S.C. § 10302 (VRA § 3) nor 52 U.S.C. § 10310(e) (VRA § 14), cited by Plaintiff (at 22), creates an enforcement scheme without the Attorney General. Likewise, VRA § 202(d) itself does not contemplate two enforcement mechanisms, making a private right of action incompatible with the statutory enforcement scheme.

Third, the legislative history of the VRA does not suggest otherwise. Obviously, as the Supreme Court has repeatedly confirmed, "the best evidence of Congress's intent is the statutory text," not its legislative history. *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012); *accord PCI Gaming Auth.*, 801 F.3d at 1295 (courts should consider legislative history and context

"with a skeptical eye," and only if statutory text and structure leave ambiguity (citation omitted)). Even so, the remarks by Senator Goldwater on which the United States relies do not support its conclusion. Senator Goldwater merely expressed his desire to "authorize[] the Attorney General to institute court actions to enforce compliance with the law," *or else* Congress would have to provide for "private law suits." 116 Cong. Rec. 4096 (1970). Senator Goldwater did not opine that the "'hodgepodge of legal technicalities'" in state laws should be enjoined through private lawsuits. Stmt. of Interest at 9 (quoting 116 Cong. Rec. 4096). And none of the cases the United States cites (at 9) concluded that Congress intended to include private rights of action in the statute.

In sum, the United States cannot support its conclusion (at 10) that "Congress understood Section 202 to be privately enforceable." And the authority on which the United States relies (at 10–11) addressed *different* VRA provisions with different language than § 202(d). Moreover, although Plaintiff strenuously resists this fact, it is beyond dispute that Plaintiff asks this Court to do something no other court has done previously.

Finally, allowing private enforcement would run afoul of recent Supreme Court precedent counseling otherwise. As recently as 2021 and 2023, multiple Supreme Court Justices have explained that the Supreme Court had previously "assumed—without deciding—that the Voting Rights Act of 1965 furnishes an implied cause of action under § 2" and that this was thus "an open

question." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) (Gorsuch, J., concurring); *see also Allen v. Milligan*, 599 U.S. 1, 90 n.22 (2023) (Thomas, J., dissenting) (leaving the question of private right of action in the VRA for another day because it "was not raised in this Court"). This tracks the Supreme Court's recent explanation that it is "long past the heady days in which [it] assumed common-law powers to create causes of action" and now "appreciate[s] more fully the tension between judicially created causes of action and the Constitution's separation of legislative and judicial power." *Egbert v. Boule*, 596 U.S. 482, 491 (2022) (cleaned up).

Considering the lack of any clear statement in § 202(d) to the contrary, this Court should heed the Supreme Court's admonition not to assume Congress intended to create a privately enforceable right through § 202(d). And that too is a powerful reason to dismiss Plaintiff's amended complaint.

CONCLUSION

Under a faithful application of binding authority, it is clear that Plaintiff has failed to carry its burden of showing that it has standing. Additionally, the Court should reject Plaintiff's request to read a private right of action into § 202(d), as the plain text confirms that Congress did not intend to create an individual right in that provision of the VRA. For either or both of those reasons, the Court should dismiss Plaintiff's Amended Complaint.

Respectfully submitted this 11th day of March 2024.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing brief was prepared in Century Schoolbook 13, a font and type selection approved by the Court in L.R. 5.1(B).

/s/ Gene C. Schaerr
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