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-JPB

PLAINTIFF'S OPPOSITION TO INTERVENORS' MOTION TO DISMISS

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INTRODUCTION

Notwithstanding binding precedent establishing congressional authority over presidential elections, Intervenors' motion to dismiss argues that Congress lacks the constitutional power to guarantee qualified voters the opportunity to cast absentee ballots for President and Vice President. That argument is both foreclosed by Supreme Court caselaw and wrong on the merits: the Necessary and Proper Clause and Section 5 of the Fourteenth Amendment each allow Congress to establish uniform rules for absentee ballot deadlines in order to secure constitutional rights, including the right to travel. Intervenors' motion to dismiss should be denied.

ARGUMENT

Congress's authority to ensure that voters who may be traveling away from their election district are able to vote absentee for President and Vice President and to establish relevant timeframes is well grounded in Supreme Court precedent and the U.S. Constitution. The Supreme Court held in *Oregon v. Mitchell* that Congress has the power to "set residency requirements and provide for absentee balloting in elections for presidential and vice-presidential electors," with eight justices concurring that Section 202(d) is constitutional. 400 U.S. 112, 118 (1970). This Court is bound by that holding.

I. The Supreme Court has held that Section 202(d) is constitutional.

Intervenors argue that *Mitchell* does not dictate the result here because "[t]hat case did not address whether the federal seven-day deadline for absentee-ballot applications is constitutional," Doc. 66 at 12, yet acknowledge that "the Court agreed that Congress could set residency requirements *and provide for absentee balloting* in presidential elections." *Id.* at 5; *see also Mitchell*, 400 U.S. at 119 ("[T]he residency and absentee balloting provisions of the Act are upheld."). That is a distinction without a difference. If Congress has the power to provide for absentee balloting in presidential elections—which the *Mitchell* Court unambiguously held that it does—then it has the power under the Necessary and Proper Clause to effectuate absentee balloting by establishing a period during which absentee ballot applications must be accepted. More than two hundred years ago, Chief Justice John Marshall wrote "language that has come to define the scope of the Necessary and Proper Clause . . . : 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited . . . are constitutional.'" *United States v. Comstock*, 560 U.S. 126, 134 (2010) (quoting *McCulloch v. Maryland*, 17 U.S. 316, 421 (1819)). In *Mitchell*, eight justices agreed that Congress can provide for absentee balloting in presidential elections; that holding fatally undermines Intervenors' constitutional challenge to Section 202(d).

II. Section 202(d) is permissible under the Necessary and Proper Clause.

Even setting aside *Mitchell*—which this Court cannot do—the statute easily passes constitutional muster. The Constitution indisputably protects "the right to go from one place to another, including the right to cross state borders while en route." *Saenz v. Roe*, 526 U.S. 489, 500 (1999). The Supreme Court repeatedly has declined "to ascribe the source of this right to travel interstate to a particular constitutional provision," *Shapiro v. Thompson*, 394 U.S. 618, 630 (1969), and has acknowledged that "it does not necessarily rest on the Fourteenth Amendment[.]" *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971). But even though "there have been recurring differences in emphasis within the Court as to the source of the constitutional right of interstate travel . . . [a]ll have agreed that the right exists." *United States v. Guest*, 383 U.S. 745, 759 (1966); *see also Saenz*, 526 U.S. at 501 ("[W]e need not identify the source of that particular right in the text of the Constitution. . . . [it] may simply have been 'conceived from the beginning to be a necessary concomitant of the stronger Union the Constitution created.'"); *Dunn v. Blumstein*, 405 U.S. 330, 338 (1972) ("'[F]reedom to travel throughout the United States has long been recognized as a basic right under the Constitution.'" (quoting *Guest*, 383 U.S. at 758)).

Because the right to travel, "like other rights of national citizenship, is within the power of Congress to protect by appropriate legislation," *Griffin*, 403 U.S. at 106, the question is "whether the statute constitutes a means that is rationally

related" to protecting the right to travel, *Comstock*, 560 U.S. at 134. *See also Dunn*, 405 U.S. at 341 ("The right to travel is an 'unconditional personal right,' a right whose exercise may not be conditioned." (quoting *Shapiro*, 394 U.S. at 643)). It does. Congress expressly enacted Section 202 "in order to secure and protect" several identified rights, including "the inherent constitutional right of citizens to enjoy their free movement across State lines." 52 U.S.C. § 10502(a), (b). To accomplish this goal, Congress found it "necessary . . . to establish nationwide, uniform standards relative to absentee registration and absentee balloting in presidential elections." *Id.* § 10502(b). These findings reflect the reasonable conclusion that requiring a citizen to be in a particular state at a particular time in order to vote for President burdens that citizen's fundamental right to travel. That is sufficient to permit legislation pursuant to the Necessary and Proper Clause.

Intervenors attempt to establish a higher standard for right-to-travel cases, relying on *Dunn v. Blumstein* to suggest that the right to travel "does not reach incidental burdens resulting from laws that apply to 'all residents, old and new.'" Doc. 52 at 9 (quoting *Dunn v. Blumstein*, 405 U.S. 330, 342 n.12 (1972)). But *Dunn* does not say what Intervenors claim it does—in fact, *Dunn* says nothing at all about congressional power to protect the right to travel. *Dunn* concerned an equal protection challenge to Tennessee's durational residence requirement. In the context of an equal protection challenge, whether a state statute distinguishes between

current residents and new residents is of course relevant. And *Dunn* holds that differential treatment based on recent travel violates the Equal Protection Clause. But Plaintiff here has not alleged that Georgia's absentee ballot application deadline violates the Equal Protection Clause. The question that this Court must resolve is whether Congress has the power under the Constitution to safeguard the right to travel by establishing uniform absentee balloting rules. As explained above, the Necessary and Proper Clause gives it that power.

III. Section 202(d) is permissible under the Fourteenth Amendment.

Section 202(d) also satisfies the more limited congruence and proportionality test for rights protected by the Fourteenth Amendment. The first step in this three-part analysis is to determine "which right or rights" Congress sought to protect. *Nat'l Ass'n of the Deaf v. Florida*, 980 F.3d 763, 771 (11th Cir. 2020). Congress helpfully identified those rights in the statute itself, including "the inherent constitutional right of citizens to vote for their President and Vice President" and "the inherent constitutional right of citizens to enjoy their free movement across State lines." 52 U.S.C. § 10502(a). The second step is to look at the relevant history to determine whether "Congress had documented a sufficient historical predicate . . . to justify enactment of a prophylactic remedy." *Nat'l Ass'n of the Deaf*, 980 F.3d at 773. It did. For example, two days before the bill that became Section 202 passed the Senate, Senator Goldwater of Arizona noted on the Senate floor that

"[a]pproximately 3 to 5 million . . . fully qualified American citizens were denied the right to vote for President because they were away from home on election day and were not allowed to obtain absentee ballots." 116 Cong. Rec. S6991 (Mar. 11, 1970). He then decried that, although "most States do permit some form of absentee voting, . . . the catch is that some of these same States impose unrealistic cutoff dates on the time when persons can apply for absentee ballots," resulting in "disqualification of great numbers of citizens who do not know early enough that they will be away at the time of voting." *Id.*

The third step is to analyze whether the legislation is "an appropriate response to this history." *Nat'l Ass'n of the Deaf*, 980 F.3d at 773. Ensuring that voters have sufficient time to apply for their absentee ballots for presidential elections clearly is an appropriate response to the problem of millions of Americans being unable to vote for President because of "unrealistic cutoff dates" for absentee ballot applications: it directly targets the identified problem and solves it through a minor adjustment to state laws, most of which (as Senator Goldwater noted) allow for absentee ballot applications on varying timeframes. In enacting Section 202, "the evidence Congress had before it of a constitutional wrong" was significant, and "the scope of the response Congress chose to address that injury" was extremely narrow. *Allen v. Cooper*, 589 U.S. 248, 261 (2020). The statute, therefore, is a permissible exercise of Congress's power under the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, this Court should deny Intervenors' motion to dismiss.

Dated: May 17, 2024

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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: May 17, 2024

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