United States District Court
Western District of Wisconsin

PUBLIC INTEREST LEGAL FOUNDATION, INC. *Plaintiff*, ***v.*** **MEAGAN WOLFE,** in her official capacity as the Administrator of the Wisconsin Elections Commission**,** *Defendant*.	**Case No. 3:24-cv-00285-JDP**

PLAINTIFF PUBLIC INTEREST LEGAL FOUNDATION'S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

Thirty years ago, Congress decided that decisions about who is and is not eligible to vote should be transparent and publicly accessible, so that voting rights are not lost to errors and inefficiencies, or worse, discrimination. That decision is embodied in Section 8(i) of the National Voter Registration Act of 1993 ("NVRA"). Section 8(i) mandates public disclosure and reproduction of "all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters[.]" 52 U.S.C. § 20507(i)(1) ("Public Disclosure Provision").

When Congress passed the NVRA, it gave exemptions for states offering voter registration on Election Day. These states were exempt from the entire law, including the transparency mandates (hereafter, "Disclosure Exemption"). Wisconsin is one exempt state. Congress's decision to treat Wisconsin differently than other states was extraordinary. The Constitutional architecture of the 1787 Convention assumes that the federal government would treat the sovereign states equally. *See Shelby County v. Holder*, 570 U.S. 529 (2013). When Congress departs from this founding principle it must have a reason "that makes sense in light of current conditions. It cannot rely simply on the past." *Id*. at 553.

As a threshold question, this case asks whether Congress's decision to exempt Wisconsin from the Public Disclosure Provision "makes sense in light of current conditions." *Id*. The Foundation's Complaint plausibly alleges that it does not. In fact, Wisconsin's exemption did not "make[] sense" in 1993, and it certainly does not now "in light of" intervening events. Wisconsin currently conducts a robust and multi-faceted voter list maintenance program, which is designed to grant, preserve, and remove voting rights. The transparency, oversight, and franchise protection that the NVRA is designed to provide is needed equally in Wisconsin. It always was.

Wisconsin (and other exempt states) are no longer unique in their offer of Election Day Registration ("EDR"). The practice has expanded to more than twenty states, yet they are not exempt from Section 8(i)'s transparency obligations. There is no good reason, "in light of current conditions," that Wisconsin should be exempt from the NVRA. Even assuming Wisconsin's offering EDR justified its Disclosure Exemption in 1993 (it did not), it no longer does so.

With the NVRA effective in Wisconsin, the Foundation's claim to relief under the NVRA is plausibly alleged. Courts universally agree that state voter rolls are subject to disclosure under the Public Disclosure Provision. Wisconsin's Official Registration List, *see* Wis. Stat. § 6.36(1)(a), is no different. Furthermore, Wisconsin's laws that contravene the NVRA's disclosure and cost requirements are preempted because the NVRA, as a federal enactment, is superior to conflicting state laws under the Constitution's Elections Clause. *See Arizona v. Inter Tribal Council of Ariz.*, Inc., 570 U.S. 1, 12-15 (2013) ("*Inter Tribal*"). Therefore, by concealing year-of-birth data and conditioning disclosure on payment of unreasonable fees, Wisconsin is violating the NVRA.

Defendant Meagan Wolfe's ("Administrator") motion to dismiss relies primarily on the existence of the Disclosure Exemption the Foundation's Complaint alleges is invalid. The Exemption, of course, must be *justified* under current conditions, not simply cited. The challenge here does not end by mere citation of the Exemption; the Exemption is under Constitutional challenge.

The Administrator does not justify the Exemption. Instead, she takes the unsustainable position that the Constitution's equal state sovereignty principle does not apply here. It does apply. The equal state sovereignty principle is the foundation of our federalist design and "remains highly pertinent in assessing subsequent disparate treatment of States." *Shelby County*,

570 U.S. at 544. It restrains Congress's power, even when Congress is exercising its legitimate authority. Neither Wisconsin nor the NVRA is immune from this scrutiny.

Importantly, the Public Disclosure Provision is no ordinary transparency law. Its unique and expansive scope is deliberate because it is designed to protect the right that is "preservative of all rights"—the right to vote. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). To that end, Congress designed the Public Disclosure Provision to shed light on *all* activities that determine who belongs and who does not belong on the voter rolls. In Wisconsin, those determinations are currently made in the dark.

The Foundation's Complaint plausibly alleges that Wisconsin's Disclosure Exemption is unjustified under the principles reaffirmed in *Shelby County* and fails the Fourteenth Amendment's congruence and proportionality test. The Foundation's Complaint also plausibly alleges that the Administrator is violating the NVRA by denying and conditioning access to public records, and that the NVRA preempts inconsistent Wisconsin law. The Foundation's injuries are directly traceable to the Administrator's action. The Foundation thus has standing and plausibly states a claim for relief. The Administrator's motion to dismiss should be denied.[1]

BACKGROUND

The National Voter Registration Act of 1993

"For many years, Congress left it up to the States to maintain accurate lists of those eligible to vote in federal elections, but in 1993, with the enactment of the National Voter Registration Act (NVRA), Congress intervened." *Husted v. A. Philip Randolph Inst.*, 584 U.S.

[1] With this response, the Foundation has filed a notice pursuant to Federal Rule of Civil Procedure 5.1, which requires a party whose pleading "draw[s] into question the constitutionality of a federal or state statute" to notify the Attorney General of the United States. The Foundation will serve the filed notice on the Attorney General, as required by Fed. R. Civ. P. 5.1(a)(2).

756, 761 (2018). The Supreme Court has described the NVRA as "a complex superstructure of federal regulation atop state voter-registration systems." *Inter Tribal*, 570 U.S. at 5. The NVRA, generally, is an exercise of Congress's authority under the Constitution's Elections Clause, U.S. Const. Art. I, § 4, cl. 1; *see also Inter Tribal*, 570 U.S. at 8-9, and the Fourteenth and Fifteenth Amendments, U.S. Const. Amend. 14, Sec. 5; U.S. Const. Amend. 15, Sec. 2; *Condon v. Reno*, 913 F. Supp. 946, 962 (D.S.C. 1995) ("The legislative history and the text of the NVRA are clear that Congress was utilizing its power to enforce the equal protection guarantees of the Fourteenth Amendment."); *see also id*. at 967 ("Congress had a sound basis on which to conclude that a federal voter registration law was an appropriate means of furthering the protections of the Fourteenth and Fifteenth Amendments.").

"The [NVRA] has two main objectives: increasing voter registration and removing ineligible persons from the States' voter registration rolls." *Husted*, 584 U.S. at 761. And at the same time, "Congress was well aware of the 'long history of … list cleaning mechanisms which have been used to violate the basic rights of citizens' when it enacted the NVRA." *Husted*, 584 U.S. at 807 (Sotomayor, J., dissenting). The NVRA's legislative history indicates that Congress intended to "reduce … obstacles to voting to the absolute minimum while maintaining the integrity of the electoral process." H.R. Rep. No. 103-9 at 106-07 (1993). Congress thus intended to address problems through the NVRA and the NVRA's findings and purposes reflect this goal.

When Congress passed the NVRA, it found,

(1) the right of citizens of the United States to vote is a fundamental right;

(2) it is the duty of the Federal, State, and local governments to promote the exercise of that right; and,

(3) discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and

> disproportionately harm voter participation by various groups, including racial minorities.

52 U.S.C. § 20501(a).

> Congress enacted the NVRA for the following purposes:
>
> (1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office;
>
> (2) to make it possible for Federal, State, and local governments to implement this Act in a manner that enhances the participation of eligible citizens as voters in elections for Federal office;
>
> (3) to protect the integrity of the electoral process; and,
>
> (4) to ensure that accurate and current voter registration rolls are maintained.

52 U.S.C. § 20501(b).

The NVRA imposes various requirements on the states with respect to voter registration, including the requirement that state driver's license applications serve as applications for voter registration, 52 U.S.C. § 20504(a)(1), and the requirement that each state use reasonable efforts to remove the names of registrants who are ineligible due to death or a change in residency, 52 U.S.C. § 20507(a)(4)(A)-(B).

As noted, the NVRA also requires the states to allow public inspection and reproduction of voter list maintenance records. The Public Disclosure Provision provides, "Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters[.]" 52 U.S.C. § 20507(i)(1). The only exempt records are those that "relate to a declination to register to vote or the identity of the voter registration agency through which any particular voter registered." *Id*.

The Public Disclosure Provision's goal is transparency, but not only for transparency's sake. Rather, Congress included the Public Disclosure Provision to ensure that the NVRA's other goals were achieved, as multiple courts have recognized. In the words of the Fourth Circuit, the Public Disclosure Provision "embodies Congress's conviction that Americans who are eligible under law to vote have every right to exercise their franchise, a right that must not be sacrificed to administrative chicanery, oversights, or inefficiencies." *Project Vote/Voting for Am., Inc. v. Long,* 682 F.3d 331, 334-35 (4th Cir. 2012) ("*Project Vote*"). The court recognized further,

> It is self-evident that disclosure will assist the identification of both error and fraud in the preparation and maintenance of voter rolls. State officials labor under a duty of accountability to the public in ensuring that voter lists include eligible voters and exclude ineligible ones in the most accurate manner possible. Without such transparency, public confidence in the essential workings of democracy will suffer.

Id. at 339. In the words of the First Circuit, the Public Disclosure Provision "evinces Congress's belief that public inspection, and thus public release, of Voter File data is necessary to accomplish the objectives behind the NVRA." *Pub. Int. Legal Found., Inc. v. Bellows*, 92 F.4th 36, 54 (1st Cir. 2024). Various United States District Courts accord. *See*, *e.g*., *Bellitto v. Snipes*, No. 16-cv-61474, 2018 U.S. Dist. LEXIS 103617, at *12 (S.D. Fla., Mar. 30, 2018) (citing 52 U.S.C. § 20507(i)) ("To ensure that election officials are fulfilling their list maintenance duties, the NVRA contains public inspection provisions."); *True the Vote v. Hosemann*, 43 F. Supp. 3d 693, 721 (S.D. Miss. 2014) ("The Public Disclosure Provision thus helps 'to ensure that accurate and current voter registration rolls are maintained.'") (citations and quotations omitted).

In short, the Public Disclosure Provision exists so the public can evaluate the adequacy, effectiveness, and lawfulness of officials' voter list maintenance actions—actions that grant and remove voting rights. For example, the NVRA's transparency allows individuals and advocacy groups like the Foundation to determine whether "accurate and current voter registration rolls are

maintained," 52 U.S.C. § 20501(b)(4), or whether states are imposing "discriminatory and unfair registration laws and procedures," 52 U.S.C. § 20501(a)(3). Such "[p]ublic disclosure promotes transparency in the voting process, and courts should be loath to reject a legislative effort so germane to the integrity of federal elections." *Project Vote*, 682 F.3d at 339-40.

The NVRA Exemption for States with EDR 30 Years Ago

NVRA Section 4(b) provides that the NVRA does not apply to states that, on August 1, 1994, did not have a voter registration requirement, or allowed all voters to register at the polling place on Election Day. 52 U.S.C. § 20503(b)(1)-(2) (hereafter, the "NVRA Exemption"). The NVRA's public face was its "motor voter" feature, which required states to offer voter registration opportunities to driver's license applicants. 52 U.S.C. § 20504(a)(1). Congress reasoned that EDR was better than "motor voter," and so states offering the better option would not be burdened with the cost of implementing the "motor voter" requirements. *See* H.R. Rep. No. 103-9 at 110 (1993) ("The Committee believes that states which have implemented one or both of these exceptions have lessened the impediments to registration which goes significantly beyond the requirements of the bill."). Yet Congress did not limit the exemption to "motor voter" requirements. That would have been more congruent and proportional. Instead, Congress exempted states with EDR from the entire NVRA, which includes the Public Disclosure Provision.

Wisconsin has offered EDR continuously since at least August 1, 1994, and therefore presumably qualifies for the NVRA Exemption under 52 U.S.C. § 20503(b)(2). Due to the NVRA Exemption, Wisconsin is currently not required to maintain all voter list maintenance records for at least two years, make all voter list maintenance records public, nor limit records-production costs to "photocopying at a reasonable cost." *See* 52 U.S.C. § 20507(i)(1).

The Foundation's Request for Records Under the NVRA

The Foundation is a non-profit, non-partisan, 501(c)(3) organization that specializes in election and voting rights issues. (Doc. 1 ¶ 5.) For its work, the Foundation relies heavily upon the Public Disclosure Provision. (*Id*.) Among other programming, the Foundation uses records compiled through the NVRA to analyze the programs and activities of state and local election officials to determine whether lawful efforts are being made to keep voter rolls current and accurate, and to determine whether eligible registrants have been improperly removed from voter rolls. (*Id*.) The Foundation educates the public and government officials about its findings. (*Id*.)

Wisconsin requires voter registration (Doc. 1 ¶¶ 26-27), and currently conducts numerous voter list maintenance activities (*id*. ¶¶ 28-42). Wisconsin law requires the Wisconsin Election Commission ("WEC") "compile and maintain electronically an official registration list," which includes, for each registrant, data such as name, address, and date of birth. (*Id*. ¶ 84); Wis. Stat. § 6.36(1)(a). Requestors may purchase a copy of the Official Registration List through WEC's website for a fee, which is established by WEC, Wis. Stat. § 6.36(6). The fee WEC charges requestors depends on the number of records requested, plus a base fee per report.

> The charge for reports in electronic format is a $25 base fee per report; plus $5 for the first 1,000 voter registration data records, or up to 1,000 voter registration data records; plus $5 for each additional 1,000 voter registration data records, rounded to the nearest thousand. The maximum charge for an electronic report is $12,500.

Wis. Adm. Code, EL 3.50(4) (hereafter, the "Data Fees"). The State of Wisconsin had 3,452,522 active registered voters on June 1, 2024. https://elections.wi.gov/resources/statistics/june-1-2024-voter-registration-statistics (last accessed June 20, 2024). The cost of receiving an electronic copy of the complete Official Registration List is, therefore, the maximum charge of $12,500.[2]

[2] When the Foundation made its Request (January) and when the Foundation filed this action (April), the cost of receiving an electronic copy of the Official Registration List was also the

Although the Official Registration List contains date-of-birth information, it is exempt from disclosure under Wisconsin law. Wis. Stat. § 6.36(1)(b)(1)(a) (hereafter, "Birth Year Ban"). WEC reiterates on its website, "The WEC will never provide date of birth information (including age or age range)[.]" WEC, Badger Voters – FAQs, "What data is not available?", https://badgervoters.wi.gov/faq (last accessed June 20, 2024). In other words, requestors cannot receive even registrants' *years* of birth.

On January 24, 2024, pursuant to the Public Disclosure Provision, the Foundation requested the following records from the WEC:

1. A current or most updated copy (.CSV or .TXT formats) of the complete Wisconsin Official Registration List as described in Wis. Stat. § 6.36 containing all data fields except for operator's license and/or last-four of Social Security number (Wis. Stat. § 6.36(1)(a)(5)). Please include year of birth as opposed to the full birth date for each registrant (Wis. Stat. § 6.36(1)(a)(2)) ("Official Registration List").
2. "Deceased Reports" received from ERIC during the years 2020, 2021, 2022, and 2023 ("ERIC Reports").

(Doc. 1 ¶ 101 ("Request").)

The Foundation offered to pay a reproduction fee for the Official Registration List not to exceed cost of reproduction. *See* Wis. Stat. § 6.45(2) (describing fee imposed on candidates). (Doc. 1 ¶ 102.)

On February 13, 2024, WEC responded to the Request through counsel, explaining, that Wisconsin is exempt from the NVRA and that WEC is processing the request under Wisconsin's public records law. (Doc. 1 ¶ 103 ("Response").) WEC's Response continued, "Wisconsin law requires the Commission to charge a fee for access to voter registration data and makes no

maximum charge of $12,500. (*See* Doc. 1 ¶ 90; https://elections.wi.gov/resources/statistics/january-1-2024-voter-registration-statistics).)

exceptions for journalists, non-profits, academics, or any other group. *See* Wis. Stat. § 6.36(6) and Wis. Admin Code § EL 3.50." (*Id*. ¶ 104.)

On February 14, 2024, the Foundation notified the Administrator that she and WEC are in violation of the NVRA for failure to permit inspection and reproduction of voter list maintenance records as required by 52 U.S.C. § 20507(i)(1). (Doc. 1 ¶ 106 ("Notice Letter").) The Notice Letter notified Administrator Wolfe that Wisconsin's statutory exemption from the NVRA's Public Disclosure Provision is no longer valid, (*id*. ¶ 107), and that WEC must make the Official Registration List, including year-of-birth information, available to the Foundation at the reasonable cost of reproduction, (*id*. ¶¶ 108-110). The next day, WEC confirmed that it is denying the Foundation's request under the NVRA because Wisconsin is statutorily exempt from the NVRA. (Doc. 1 ¶¶ 116-17.)

The NVRA ordinarily requires written notice and an opportunity to cure. 52 U.S.C. § 20510(b). "The apparent purpose of the notice provision is to allow those violating the NVRA the opportunity to attempt compliance with its mandates before facing litigation." *Ga. State Conference of the NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1335 (N.D. Ga. 2012). In this case, the curative period was 20 days because the violation occurred within 120 days of a federal election in Wisconsin. (Doc. 1 ¶ 120; Doc. 1-3 at 4); 52 U.S.C. § 20510(b)(2). The Administrator did not cure her violation within 20 days of the Notice Letter, and to date, the Administrator has still not cured her violation. (Doc. 1 ¶ 123.)

STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

ARGUMENT

I. Wisconsin's Exemption from the Public Disclosure Provision Violates the Principle of Equal State Sovereignty.

For starters, it is irrelevant for purposes of the Administrator's motion that Wisconsin is exempt from the Public Disclosure Provision on paper. That is not disputed.[3] Nor is it dispositive, as the Administrator argues. (Doc. 15 at 9-10.) What is in dispute is the *current validity of the exemption itself*. In other words, the Court must determine whether Congress may treat Wisconsin differently than other states with respect to the NVRA's transparency mandate. To answer that question, the Court must look beyond the NVRA's text and evaluate whether the NVRA's "disparate geographic coverage is sufficiently related to the problem that it targets," *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 203 (2009) ("*Northwest Austin*"), and whether Wisconsin's Exemption "makes sense in light of current conditions," *Shelby County*, 570 U.S. at 553.

When appropriately scrutinized, Wisconsin's Disclosure Exemption did not make sense when the NVRA took effect in 1994. It makes even less sense now, when nearly half the states offer registration and voting on the same day, the circumstance that supposedly justified Wisconsin's Exemption. Most of those states are not exempt and the Foundation can obtain public records there. Furthermore, Wisconsin, like nearly all other states, is constantly granting and removing voting rights as part of its statutorily mandated voter list maintenance program. Forty-four states must surrender their sovereignty and comply with the NVRA's transparency

[3] The Administrator's declaration that "[t]he Constitution itself is [not] a Freedom of Information Act" misses the mark even further. (Doc. 15 at 10.) The Foundation's right to information is grounded in statute—the NVRA—not the Constitution. The Constitution's equal sovereignty principle makes the NVRA effective in Wisconsin, but it is not the source of the Foundation's claim in this action.

mandates while Wisconsin does not. There is no credible justification for such disparate treatment anymore.

A. The Equal State Sovereignty Principle.

The United States Supreme Court is clear: "Not only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of equal sovereignty' among the States." *Shelby County*, 570 U.S. at 544 (quoting *Northwest Austin*, 557 U.S. at 203); *see also PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012) ("[T]he States in the Union are coequal sovereigns under the Constitution."). Equal state sovereignty is not just a byproduct of select Supreme Court jurisprudence; it is a bedrock principle upon which the nation was founded. As the Supreme Court explains, "'[T]he constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.'" *Shelby County*, 570 U.S. at 544 (citing *Coyle v. Smith*, 221 U.S. 559, 580 (1911)); *see also* Thomas B. Colby, *In Defense of the Equal Sovereignty Principle*, 65 Duke L.J. 1087, 1137 ("Sovereign equality of the member states is presumptively an essential, inherent structural feature of federalism itself."). In other words, the equal state sovereignty principle is core architecture of our nation's federalist design that cannot be overridden. "[E]ven when Congress operates within its legitimate spheres of authority, it cannot limit or remove the sovereignty of some states, but not others." *Id*. at 1121.

Throughout history, the Supreme Court has applied the equal state sovereignty principle in various contexts. *See*, *e.g.*, *Coyle*, 221 U.S. at 567 (determining that Oklahoma had the authority to change the location of its capital as the nation "is a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself"); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-92 (1980) (noting that the "concept of minimum contacts" in a personal jurisdiction

analysis "ensures that the States, through their courts, do not reach out beyond the limits imposed on them by their status as coequal sovereigns in a federal system"); *Florida v. Georgia*, 592 U.S. 433, 444 (2021) ("In short, Florida has not met the exacting standard necessary to warrant the exercise of this Court's extraordinary authority to control the conduct of a coequal sovereign."); *PPL Mont., LLC*, 565 U.S. at 590-91 ("In 1842, the Court declared that for the 13 original States, the people of each State, based on principles of sovereignty, 'hold the absolute right to all their navigable waters and the soils under them,' subject only to rights surrendered and powers granted by the Constitution to the Federal Government. *Martin v. Lessee of Waddell*, 41 U.S. 367, 16 Pet. 367, 410, 10 L. Ed. 997. In a series of 19th-century cases, the Court determined that the same principle applied to States later admitted to the Union, because the States in the Union are coequal sovereigns under the Constitution.").

More recently the Supreme Court addressed equal state sovereignty in the area of voting rights statutes. In 1965, Congress passed the Voting Rights Act ("VRA"), 52 U.S.C. § 10101 *et seq*., to combat racial discrimination in voting. VRA Section 5 required states to obtain federal preclearance before any law related to voting could go into effect. VRA Section 4 applied the preclearance requirement only to some states, those that had used a forbidden test or device in November 1964 and had less than 50 percent voter registration or turnout in the 1964 Presidential election. 52 U.S.C. § 10303(b). In 1966, the Supreme Court upheld Section 4 against a constitutional challenge, explaining that "exceptional conditions can justify legislative measures not otherwise appropriate." *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).

VRA Section 4's coverage formula was not static. The VRA contained a provision allowing covered states to "bailout" of Section 5's federal preclearance requirement by seeking a declaratory judgment from a three-judge panel in United States District Court for the District of

Columbia. *See* 52 U.S.C. § 10303(a)(1). The VRA also contained a provision under which states could be "bailed in" to the federal preclearance requirement for committing violations of the Fourteenth or Fifteenth Amendment. 52 U.S.C. § 10302(c).[4]

In 2009, the Supreme Court of the United States considered an action brought by a Texas municipal utility district seeking relief from Section 5's federal preclearance requirement under the VRA's "bailout" provision. *Northwest Austin*, 557 U.S. 193. Alternatively, the municipal utility district challenged the constitutionality of VRA Section 5. *Id*. at 197. The Supreme Court observed that in *Katzenbach*, the Court "concluded that 'exceptional conditions' prevailing in certain parts of the country justified extraordinary legislation otherwise unfamiliar to our federal system." *Id*. at 211. The Court again acknowledged that the VRA "differentiates between the States, despite our historic tradition that all the States enjoy 'equal sovereignty.'" *Id*. at 203 (citing *United States v. Louisiana*, 363 U.S. 1, 16 (1960)). While "[d]istinctions can be justified in some cases," the Supreme Court explained, "a departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets." *Id*. at 203.

The Supreme Court explained further that while the conditions that justified the VRA had "improved," "[p]ast success alone, however, is not adequate justification to retain the preclearance requirements." *Id*. at 202. "[T]he Act imposes current burdens and must be justified by current needs." *Id*. at 203. Ultimately, the Supreme Court held that the utility district was eligible to seek a "bail out" under the VRA and declined to resolve the VRA's constitutionality.

[4] The NVRA has no bailout or bail-in provisions, which made the intrusion into equal state sovereignty particularly constitutionally problematic. *See infra* Section I.C.

The ability to bail out of the VRA's disparate burdens had significant import with the Supreme Court.

Four years later, in *Shelby County*, the Supreme Court held that VRA Section 4 was unconstitutional. In doing so, the Court reaffirmed "the principle that all States enjoy equal sovereignty[.]" 570 U.S. at 535; *see also id*. at 544 ("[T]he constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.") (citations and quotations omitted). The Supreme Court instructed, with respect to a law that treats the States differently, "a statute's 'current burdens' must be justified by 'current needs,' and any 'disparate geographic coverage' must be 'sufficiently related to the problem that it targets.'" *Id*. at 550-51. Further, "Congress—if it is to divide the States—must identify those jurisdictions to be singled out on a basis that makes sense in light of current conditions. It cannot rely simply on the past." *Id*. at 553. These principles control this Court's review of the Administrator's motion.

B. Wisconsin's Exemption from the Public Disclosure Provision Is Not Justified Under Current Conditions.

The Foundation's Complaint alleges that the Disclosure Exemption departs from the principle of equal state sovereignty because it treats six states—including Wisconsin—differently than other states with respect to transparency without adequate justification.

For starters, the NVRA's "disparate geographic coverage" is not "sufficiently related to the problem that it targets." *Shelby County*, 570 U.S. at 551 (citation omitted). The Public Disclosure Provision is designed to make the voter list maintenance process transparent. *See Project Vote*, 682 F.3d at 339 ("State officials labor under a duty of accountability to the public in ensuring that voter lists include eligible voters and exclude ineligible ones in the most accurate manner possible. Without such transparency, public confidence in the essential workings of democracy will suffer."). In other words, the "problem" is the need for transparency and

oversight in the process that determines who is eligible to vote. That "problem" or need is equally prevalent in Wisconsin; there is no reason Wisconsin should have a lesser transparency obligation imposed on it under the NVRA than any other state.

Wisconsin, like 48 other states, currently requires voter registration. (*See* Doc. 1 ¶¶ 26-27.) Wisconsin also currently conducts a robust and multi-faceted voter list maintenance program, which is designed to grant, preserve, and remove voting rights. (*Id*. ¶¶ 28-42.) One of these practices—the work performed by the Electronic Registration Information Center ("ERIC")—has been criticized as inaccurate and discriminatory, (*see id*. ¶¶ 43-49)—two problems at which the NVRA takes aim, *see* 52 U.S.C. § 20501(a)(3), (b)(4). Barbara Arnwine, the former executive director of the Lawyers' Committee for Civil Rights Under Law, stated, "ERIC should be called ERROR because it's that erroneous and that full of flaws." Palast, ERIC Crow, Jim Crow's liberal twin (July 15, 2020), https://www.nationofchange.org/2020/07/15/eric-crow-jim-crows-liberal-twin/ (last accessed June 26, 2024). This criticism is not generic. It is specific to Wisconsin. The Brennan Center for Justice reported the following in a 2019 report:

> Wisconsin … reported that although ERIC was helpful in updating more than 25,000 registration addresses in 2017 and 2018, it also resulted in more than 1,300 voters signing 'supplemental poll lists' at a spring 2018 election, indicating that they had not in fact moved and were wrongly flagged.

(Doc. 1 ¶ 45 (citing Brater et al., Purges: A Growing Threat to the Right to Vote at 9 (2019), https://www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf (last accessed June 26, 2024)).) A Yale University-led study of ERIC in Wisconsin "found that at least 4% of people listed as suspected 'movers' cast ballots in 2018 elections using addresses that were wrongly flagged as out of date. Minority voters were twice as likely as white voters to cast their ballot with their original address of registration after the state marked them as having moved, the study showed." (Doc. 1 ¶ 47 (citing Yale University, Study uncovers flaws in process

for maintaining state voter rolls (Feb. 26, 2021), https://phys.org/news/2021-02-uncovers-flaws-state-voter.html (last accessed June 26, 2024)).) The study's lead author, political scientist Gregory A. Huber, stated,

> **The process of maintaining states' voter-registration files cries out for greater transparency[.]** … Our work shows that significant numbers of people are at risk of being disenfranchised, particularly those from minority groups. Unfortunately, we don't know enough about the process used to prune voter rolls nationwide to understand why mistakes occur and how to prevent them.

Id. (emphasis added).

As in all states, there is a need for transparency and oversight in the voter list maintenance process in Wisconsin. Yet Wisconsin is exempt from the NVRA's transparency mandate. Because the NVRA exempts a state where the "problem" is equally pervasive, the "disparate geographic coverage" is not "sufficiently related to the problem that the [NVRA] targets." *Shelby County*, 570 U.S. at 551 (citation omitted).

For the same reasons, the NVRA's "current burdens" are not justified by "current needs." *Shelby County*, 570 U.S. at 550 (citation omitted). Forty-four states are burdened by a loss of sovereignty and by compliance with the Public Disclosure Provision. Wisconsin is not. Do "current needs" justify those disparate burdens? No. As explained, Wisconsin is similar situated to nearly all other states currently subject to the NVRA in terms of voter registration and voter list maintenance "programs and activities," 52 U.S.C. § 20507(i)(1). There is plainly a "current need[]" for transparency in Wisconsin. *Shelby County*, 570 U.S. at 550. Indeed, the public in Wisconsin and other exempt states also faces a considerable burden on its ability to oversee and scrutinize the activities that grant and remove voting rights.

Congress also identified the other problems it was targeting when it passed the NVRA. *See* 52 U.S.C. § 20501(a)-(b) (NVRA findings and purposes). The Act's purposes include

eliminating discriminatory registration practices, increasing registration rates, and maintaining election integrity. These goals are currently of equal importance and relevance in Wisconsin compared to other states. *See* WEC, Wisconsin's Commitment to Election Integrity, https://elections.wi.gov/wisconsins-commitment-election-integrity (last accessed June 20, 2024) ("The Wisconsin Elections Commission takes any allegation of election misconduct seriously, whether it is by candidates, voters, political parties, or other groups seeking to influence the outcome of elections."). The Administrator does not suggest otherwise. As many courts have found, the Public Disclosure Provision is a means to achieve these other purposes through oversight and accountability. *See Bellows*, 92 F.4th at 54. For example, the NVRA's transparency mandate allows individuals and advocacy groups like the Foundation to determine whether "accurate and current voter registration rolls are maintained," 52 U.S.C. § 20501(b)(4), or whether states are imposing "discriminatory and unfair registration laws and procedures," 52 U.S.C. § 20501(a)(3). An improper cancellation of a voter's registration, for example, cannot be understood, remedied, or prevented absent transparency. The NVRA's other objectives are equally relevant in Wisconsin. Yet Wisconsin is exempt from the transparency mandate meant to achieve those objectives. The NVRA's "disparate geographic coverage" is thus again not "sufficiently related to the problem that the [NVRA] targets." *Shelby County*, 570 U.S. at 551 (citation omitted).

Wisconsin's offering EDR does not affect the outcome. In fact, EDR is a voter list maintenance activity and Wisconsin has enacted specific procedures to govern EDR. Wis. Stat. Ann. § 6.56(3). EDR registrants who fail address verification are made ineligible to vote and are referred to the district attorney. *Id*. The EDR process is not immune from discriminatory application, inefficiency, error, or mistake. *See Project Vote*, 682 F.3d at 339. Like all

mechanisms that grant and remove voting rights, the EDR process needs the NVRA's transparency. *See id*. at 339-40 ("Public disclosure promotes transparency in the voting process, and courts should be loath to reject a legislative effort so germane to the integrity of federal elections."). And notwithstanding its EDR process, Wisconsin has the need and desire to do the very same things Congress designed the NVRA to do: protect the fundamental right to vote, remove unfair registration laws, protect the integrity of the electoral process, and maintain accurate voter rolls. Transparency in the EDR process is an important means to achieve these goals.

Furthermore, EDR—the original and sole condition for the NVRA Exemption—is no longer unique to the exempt states. Nineteen other states and the District of Columbia have implemented EDR. *See* https://www.ncsl.org/elections-and-campaigns/same-day-voter-registration (last accessed June 26, 2024). Thirteen states of those nineteen states and the District of Columbia are subject to the NVRA's Public Disclosure Provision, while Wisconsin and five other states are not. Put differently, it makes no sense that Wisconsin should be exempted from the Public Disclosure Provision, while Iowa and Illinois are not. Under "current conditions," the NVRA's disparate treatment does not "make[] sense." *Shelby County*, 570 U.S. at 553.

Even if the Disclosure Exemption was justified in 1994, it cannot be sustained under "current conditions." Wisconsin currently has an equal need for transparency in the voter list maintenance process, and Congress's other findings (52 U.S.C. § 20501(a)) and the NVRA's other purposes (52 U.S.C. § 20501(b)) are equally relevant in Wisconsin today, where voting rights are constantly granted, preserved, and removed. The NVRA's departure from the equal state sovereignty principle is no longer justified.

In response, the Administrator suggests that the Disclosure Exemption is justified under *Shelby County* because EDR promotes some of the NVRA's objectives—namely increasing registration and maintaining accurate voter registration records. (Doc. 15 at 19-20.) There are several problems with this argument. For starters, whether EDR replaces the need for transparency in the *entire* voter list maintenance process "raises inherently factual issues that should not be resolved on a motion to dismiss." *Air Line Pilots Ass'n, Int'l v. Dep't of Aviation*, 45 F.3d 1144, 1154 (7th Cir. 1995).

Even without the benefit of discovery, the Court can conclude that EDR is not a substitute for the transparency Congress intended. For example, take the Administrator's belief that EDR ensures accurate voter rolls because it "allows the[] voters to correct their registration information on Election Day, ensuring that they are not disenfranchised." (Doc. 15 at 20.) The Administrator appears to be saying that errors, mistakes, and even discrimination, in the voter list maintenance process are acceptable because registrants can allegedly fix those problems at their polling place. In other words, registrants who suffer discrimination just need to be patient and trust that their rights will be restored on Election Day.

Imagine election officials refusing to process registration applications for students at a historically black college or university and refusing to provide the records that were part of the decision to deny voter registration. Those were the facts in *Project Vote v. Long*. *See Project Vote/Voting for Am., Inc. v. Long*, 752 F. Supp. 2d 697, 699 (E.D. Va. 2010). "No need to be concerned," the Administrator essentially says. "Show up on Election Day and fix it all." Fortunately, the Public Disclosure Provision applies in Virginia and an advocacy group was able to use it to compel election officials to produce the denial-related records. *See Project Vote*, 682

F.3d at 340. That is not possible in Wisconsin, and because it is not, EDR is not a substitute for the Public Disclosure Provision.

Wisconsin is statutorily mandated to conduct voter list maintenance throughout the year, and is thus constantly granting, preserving, and removing voting rights. (Doc. 1 ¶¶ 28-42.) The Public Disclosure Provision exists so that the public can *always* monitor these activities. *See, e.g.*, *Bellitto*, 2018 U.S. Dist. LEXIS 103617, at *12-13 (explaining that the Public Disclosure Provision "convey[s] Congress's intention that the public should be monitoring the state of the voter rolls and the adequacy of election officials' list maintenance programs"). The public cannot do so in Wisconsin. In fact, WEC admits that effective and accurate public evaluation of its voter list maintenance activities is impossible because the public does not have access to date of birth information. On its website, WEC explains, "Third parties do not have access to birth date data or to the current registration list. As a result, they falsely identify non-duplicates and also flag records previously reported to clerks through the Registration List Alert process." WEC, Emails from Third Parties, Oct. 3, 2022, https://elections.wi.gov/memo/emails-third-parties (last accessed June 22, 2024). The transparency Congress envisioned exists at all times and allows errors, mistakes, and discrimination to be discovered and corrected, whenever those things may occur. That kind of transparency does not exist in Wisconsin.

In any event, the Administrator ignores that under "current conditions[,]" nineteen states and the District of Columbia now offer the same EDR opportunities that supposedly justified Wisconsin's Disclosure Exemption. (Doc. 1 ¶ 72.) Yet only some of those states, like Wisconsin, are exempt from the NVRA's Public Disclosure Provision. Even if EDR promotes some of the NVRA's objectives, there remains an unjustified disparity in state sovereignty, which the Constitution and *Shelby County* do not permit.

The Public Disclosure Provision is an open records law, which broadly requires disclosure and reproduction of "all" voter list maintenance records. 52 U.S.C. § 20507(i)(1). As method for granting voting rights, EDR actually *enhances* the need for transparency. There can be no argument that EDR is an adequate substitute for Congress' transparency goals.

C. The Administrator Offers No Valid Reason to Disregard the Equal State Sovereignty Principle.

The Administrator's motion relies primarily on the mere existence of the Disclosure Exemption. (Doc. 15 at 9-10.) But that is the very thing the Foundation challenges. The Supreme Court admonishes that departures from the equal state sovereignty principle "cannot rely simply on the past," *Shelby County*, 570 U.S. at 553, which is precisely what the Administrator does in merely citing the thirty-year-old Act as her primary defense. Instead, the Disclosure Exemption must be justified under "current conditions." *Id*. The Administrator offers very little in support of the Disclosure Exemption, making the grant of a Rule 12 motion especially premature. At worst for the Foundation, this is a factual dispute not appropriate for a dismissal under Rule 12. Rather than justify the Disclosure Exemption, the Administrator offers various reasons why *Shelby County* is distinguishable or cannot be raised. Whatever surface-level differences *Shelby County* may have from the present case do not invalidate the equal state sovereignty principle, nor do they prevent the Foundation from asserting it in the first instance.

i. The Foundation May Invoke the Equal State Sovereignty Principle.

The Administrator claims the Foundation cannot invoke the equal state sovereignty principle because "[t]he Foundation is not a state or local government" and "has no right of 'equal sovereignty.'" (Doc. 15 at 11.) The Administrator is wrong. The Supreme Court and the Seventh Circuit hold that a private party may raise constitutional principles, including principles embodied in the Tenth Amendment, in suits seeking relief from personal injuries. In other words,

the sovereignty of America's states does not depend on the identity of the plaintiff, nor does the Foundation lose standing because its injury is caused more directly by something other than the constitutional principle invoked.

In *Bond v. United States*, 564 U.S. 211 (2011), the Supreme Court considered "whether a person indicted for violating a federal statute has standing to challenge its validity on grounds that, by enacting it, Congress exceeded its powers under the Constitution, thus intruding upon the sovereignty and authority of the States." *Id*. at 214. The Court answered that question "yes." *Id*.

An *amicus* appointed to defend the contrary decision of the court of appeals claimed, like the Administrator here, that "to argue that the National Government has interfered with state sovereignty in violation of the Tenth Amendment is to assert the legal rights and interests of States and States alone," which is forbidden by the "prudential rule" that a party "cannot rest his claim to relief on the legal rights or interests of third parties." *Id*. at 220. "[N]ot so," ruled the Supreme Court. *Id*. "The individual, in a proper case, can assert injury from governmental action taken in excess of the authority that federalism defines. Her rights in this regard do not belong to a State." *Id*. The Supreme Court continued,

> The limitations that federalism entails are not therefore a matter of rights belonging only to the States. States are not the sole intended beneficiaries of federalism. *See New York*, *supra*, at 181, 112 S. Ct. 2408, 120 L. Ed. 2d 120. An individual has a direct interest in objecting to laws that upset the constitutional balance between the National Government and the States when the enforcement of those laws causes injury that is concrete, particular, and redressable. **Fidelity to principles of federalism is not for the States alone to vindicate.**

Bond, 564 U.S. at 222 (emphasis added).

The Supreme Court is clear: "[W]here the litigant is a party to an otherwise justiciable case or controversy, she is not forbidden to object that her injury results from disregard of the federal structure of our Government." *Id*. 225-26. That is precisely the case here. The

Foundation's injury, or case, is premised on a violation of the NVRA. That injury "results from disregard of the federal structure of our Government," *id*., namely, the equal state sovereignty principle embodied in the Tenth Amendment. Under *Bond*, the Foundation may invoke that principle to secure relief for its statutory injury.

Before *Bond*, the Seventh Circuit reached a similar conclusion in *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999). *Gillespie* involved a private citizen's challenge to a federal gun statute that made him unable to possess a firearm, circumstances that caused him to lose his job as a police officer. *Id*. at 697.

Gillespie argued on appeal that the federal gun statute violated multiple constitutional principles, including "the Tenth Amendment's guarantee of state sovereignty." *Id*. at 700. The United States argued that Gillespie had no standing to make that argument because "any aspect of state sovereignty impinged upon by the Gun Control Act is one that the State, rather than an individual, must assert." *Id*. The United States claimed "[i]t is particularly inappropriate to allow a private individual to raise such concerns … where … the state or local government whose Tenth Amendment interests are being advocated is a party to the case and takes a contrary position." *Id*. The Seventh Circuit disagreed.

The Seventh Circuit held that the Supreme Court's decision in *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59 (1978) "rejects any categorical requirement that there be a logical nexus between the plaintiff's injury and the nature of the constitutional right he asserts[.]" *Gillespie*, 185 F.3d at 701-02. In other words, it made no difference for standing purposes that Gillespie's injuries—the loss of the ability to carry a gun and loss of employment—were not rights protected by the constitutional principles he invoked, namely, the Tenth Amendment. Applying *Gillespie* here means it makes no difference that the Foundation's

injuries—information deprivation and related adverse effects—are not rights guaranteed by the equal state sovereignty principle. The Administrator's protestation that "the concept of 'equal sovereignty' doesn't supply a constitutional right to voter records" is irrelevant. (Doc. 15 at 12.)

Like *Bond*, *Gillespie* also rejects the Administrator's argument that a party raising state sovereignty principles is asserting rights of third parties not before the Court. *Gillespie*, 185 F.3d at 703. Indeed, the Seventh Circuit was clear: "Gillespie, in making Tenth Amendment claims, actually is asserting his own rights." *Id*. (citing *New York v. United States*, 505 U.S. 144 (1992)).

The Seventh Circuit summarized its decision:

> We are therefore satisfied that Gillespie has standing to pursue a Tenth Amendment challenge to section 922(g)(9). He has suffered a concrete injury--the loss of the ability to carry a firearm, and the consequent loss of his job as a police officer. That injury can also fairly be traced to the constitutional violation that he attributes to Congress in enacting the amendments to the statute, for if we declared the statute unconstitutional, the firearms disability would be nullified and Gillespie would regain his right to carry a firearm. *See Duke Power*, 438 U.S. at 74-77, 98 S. Ct. at 2631-32. Finally, as *New York* explains, the Tenth Amendment, although nominally protecting state sovereignty, ultimately secures the rights of individuals. Gillespie consequently has standing to raise the Tenth Amendment violation notwithstanding what state or local officials themselves may have to say about the propriety of the statute.

Gillespie, 185 F.3d at 703-04. To say that summary is "on point" here would be putting it mildly.

The Foundation's standing to bring an NVRA claim is, of course, a separate matter from the Foundation's ability to raise the equal state sovereignty principle. The Administrator, however, does not challenge the Foundation's standing under the NVRA—other than to passively cite the Disclosure Exemption that is under constitutional challenge. Such an argument would fail, even if made, because the Foundation plausibly alleges informational injuries and multiple downstream consequences caused by those informational injuries. (Doc. 1 ¶¶ 125-147.)

ii. The Administrator's Remaining Objections to *Shelby County* Fail.

The Administrator offers several other reasons *Shelby County* does not control here, none of which has merit.

First, the Administrator claims *Shelby County* is distinguishable because it involved the VRA, not the NVRA. (Doc. 15 at 13-14.) It was, of course, not the VRA that drove the outcome in *Shelby County*; it was the equal state sovereignty principle, which derives from the Constitution itself. *Shelby Cty.*, 570 U.S. at 544 ("Not only do States retain sovereignty under the Constitution, there is also a 'fundamental principle of equal sovereignty' among the States.") (quoting *Northwest Austin*, 557 U.S. at 203). If the Administrator is arguing that the equal state sovereignty principle has no application outside of *Shelby County*, she has reduced the argument to the absurd. The Constitution's federalist design did not begin or end in 2013 at Section 4 of the Voting Rights Act. The Administrator's argument on this point fails.

The Supreme Court's recognition that the VRA was both "extraordinary" and "unique" does nothing to change *Shelby County*'s significance here. The VRA was "extraordinary," 570 U.S. at 536, because it disparately intruded on states' power to regulate elections, a "sensitive area of state and local policymaking," *id*. at 545 (quoting *Lopez v. Monterey County*, 525 U.S. 266, 282 (1999), which "the Framers of the Constitution intended the States to keep for themselves," *id*. at 543 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 461-462 (1991)). The NVRA also intrudes into states' power to regulate elections, which makes the NVRA "extraordinary" and "unique" in its own right.

Its inflexibility makes the NVRA more intrusive than the VRA. Recall that the VRA coverage formula was not static. The VRA contained a provision allowing covered states to escape—to "bailout"—of Section 5's federal preclearance requirement by seeking a declaratory

judgment from a three-judge panel in United States District Court for the District of Columbia. *See* 52 U.S.C. § 10303(a)(1). The VRA also contained a provision under which states could be captured—"bailed in"—to the federal preclearance requirement for committing violations of the Fourteenth or Fifteenth Amendment. 52 U.S.C. § 10302(c). In other words, the VRA contained a mechanism that allowed it to adapt to "current conditions." *See Katzenbach*, 383 U.S. at 331 ("Acknowledging the possibility of overbreadth, the Act provides for termination of special statutory coverage at the behest of States and political subdivisions in which the danger of substantial voting discrimination has not materialized during the preceding five years."); *Briscoe v. Bell*, 432 U.S. 404, 411 (1977) ("Congress was well aware, however, that the simple formula of § 4(b) might bring within its sweep governmental units not guilty of any unlawful discriminatory voting practices. It afforded such jurisdictions immediately available protection in the form of an action to terminate coverage under § 4(a) of the Act.").

In *Northwest Austin*, the plaintiff argued that it was eligible to file a "bailout" suit and, if a bailout suit was not available to it, then Section 5 itself was unconstitutional. *See Northwest Austin*, 557 U.S. at 197. The Department of Justice also pointed to the bailout mechanism to save the statute, arguing that it was "a feature that this Court has repeatedly highlighted as indicative of Section 5's remedial nature and tailored reach…. Notably, the bailout provisions are considerably broader now than when the VRA was first upheld in South Carolina." Brief for the Federal Appellee, 2009 U.S. S. Ct. Briefs LEXIS 236 *69. The Supreme Court held the plaintiff was eligible to file a bailout suit, *Northwest Austin*, 557 U.S. at 211, and therefore did not reach the issue of Section 5's constitutionality, *Shelby County*, 570 U.S. at 540 ("Ultimately, however, the Court's construction of the bailout provision left the constitutional issues for another day."). In other words, the VRA's bailout feature saved Section 5, at least for the moment. Four years

later, the Supreme Court held that preclearance requirement was unconstitutional, notwithstanding the VRA's bailout feature. *Shelby County*, 570 U.S. at 557.

The VRA included a mechanism that allowed it to adapt to current conditions, but the NVRA does not. Yet the Supreme Court struck Section 4 of the VRA in *Shelby County* even *with* the bailout and bail in flexibility. Non-exempt NVRA states cannot regain their sovereignty. The Disclosure Exemption's departure from the principle of equal state sovereignty is even more inflexible and cannot stand.

Second, the Administrator claims *Shelby County* is distinguishable because its remedy relieved a burden rather than imposed the burden equally among the States. (Doc. 15 at 14 (arguing that *Shelby County* cannot be used to "impose additional burdens on states that Congress saw fit to exempt").) That aspect of *Shelby County* makes no difference here. The Supreme Court has approved of so-called "leveling down" remedies. "[W]hen the 'right invoked is that to equal treatment,' the appropriate remedy is a *mandate* of equal treatment, a result that can be accomplished by withdrawal of benefits from the favored class as well as by extension of benefits to the excluded class." *Heckler v. Mathews*, 465 U.S. 728, 740 (1984) (emphasis in original) (quoting *Iowa-Des Moines National Bank v. Bennett*, 284 U.S. 239, 247 (1931)).

In *Ohio v. EPA*, 98 F.4th 288 (D.C. Cir. 2024), the D.C. Circuit reasoned that such remedies could apply in equal state sovereignty cases. There, the EPA argued that redressability was lacking where states did "not ask th[e] court to increase their own sovereign authority over motor vehicle emissions," but instead sought to "to reduce California's authority." *Id*. at 307. The D.C. Circuit explained,

> Respondents have not identified—and we do not perceive—any material reason to treat the right to equal sovereignty claimed here any differently for standing purposes. And under the logic of the Equal Protection cases, holding Section 209(b) unconstitutional and vacating the waiver would redress the claimed constitutional

> injury by leaving all states equally positioned, in that none could regulate vehicle emissions.

Id. at 307-08. Similarly, the Foundation's injury will be remedied if Wisconsin is subject to the Public Disclosure Provision and required to produce the requested records on the NVRA's terms.

The equal state sovereignty principle applies whenever Congress burdens the States unequally. Forty-four states are burdened by a loss of sovereignty and by compliance with the Public Disclosure Provision, while Wisconsin is not. In other words, Congress has given some States, like Wisconsin, more sovereignty than others. That unequal treatment violates the equal state sovereignty principle unless justified. As the Foundation's Complaint plausibly alleges, it is not justified.

Imagine if Congress exempted six states from the coverage of 42 U.S.C. § 1983. Forty-four states would be required to respect federal constitutional rights, and in the six states exempted from that obligation, no citizen could bring an action to enforce Section 1983. Surely, this similar exemption scheme could not be defended constitutionally simply by asserting that a plaintiff's claim—such as for a malicious beating by police officers—is foreclosed because Congress extended a helping hand to escape federal constitutional minimums to six states. That is the position Wisconsin takes here in trying to block the Foundation's right to bring this case.

Third, the Administrator claims *Shelby County* is distinguishable because "[t]here are no 'current burdens' on Wisconsin and the 'current needs' in Wisconsin are exactly the same as when the NVRA was passed[.]" (Doc. 15 at 19.) The Administrator misunderstands the inquiry. The standard articulated in *Northwest Austin* and *Shelby County*, that "a statute's 'current burdens' must be justified by 'current needs,'" *Shelby County*, 570 U.S. at 551 (citations omitted), is a requirement whenever Congress departs from the equal state sovereignty principle. It applies no matter the location of the "burdens" or "needs." As explained, Congress was plainly

addressing needs in the states when it enacted the NVRA. Those needs were and are equally relevant in Wisconsin, notwithstanding its offering EDR. The Administrator cannot escape the Constitution simply because Congress may have overlooked the need for transparency in Wisconsin when it enacted the NVRA.

Fourth, the Administrator argues that "[u]nlike in *Shelby County*, nothing has changed over time vis-à-vis Wisconsin." (Doc. 15 at 19.) The standard articulated in *Northwest Austin* and *Shelby County* does not ask whether a change has occurred. It asks whether the departure from the Constitution's equal state sovereignty principle is justified under "current conditions." *Shelby County*, 570 U.S. at 553. The standard remains the same, no matter when the law is reviewed. In fact, in *Shelby County*, the Supreme Court rejected the argument that the VRA required a weaker justification in 2006 than in 1965. *See Shelby County*, 570 U.S. at 556 (rejecting dissenting opinion argument that "the required showing can be weaker on reenactment than when the law was first passed"). In fact, the Court labeled distinctions that the Congress drew in 1965 "irrational" if applied to the states in 2006. Likewise, any attempted distinction between states with EDR and subject to the Public Disclosure Provision (Iowa) and states with EDR but exempt (Wisconsin) today are "irrational." *See id*.

The Administrator's argument also presumes that the Disclosure Exemption made sense when the NVRA took effect in 1994. That presumption fails for the same reason the Disclosure Exemption fails under "current conditions." Transparency in the voter list maintenance process was always necessary in every state with voter list maintenance activities and EDR does nothing to change that. Furthermore, a relevant change has certainly occurred. Nearly half of the states now offer the same EDR opportunities that supposedly justified Wisconsin's NVRA Exemption. Continuing to treat Wisconsin different from these other states currently makes no sense.

II. Wisconsin's Exemption from the Public Disclosure Provision Violates the Fourteenth Amendment's Congruence and Proportionality Requirement.

In *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court held that when Congress enforces the Fourteenth Amendment through legislation, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id*. at 520. The Foundation's Complaint alleges that Wisconsin's Disclosure Exemption lacks the required "congruence and proportionality." This allegation is plausible for the same reasons the Foundation's equal state sovereignty allegations are plausible, *supra* Section 1.B— namely, because the NVRA exempts Wisconsin, where the injuries Congress sought to remedy are equally prevalent and Congress's transparency and oversight objectives are equally relevant. (*See* Doc. 1 ¶¶ 76-83.) The Administrator does not dispute the *City of Boerne* standard, but argues it cannot be applied in these circumstances, for several reasons.

First, the Administrator claims *City of Boerne* is distinguishable because it involved the Religious Freedom Restoration Act, not the NVRA or information disclosure. Like the equal state sovereignty principle, the congruence and proportionality principle is embodied in the Constitution. It is not confined to *City of Boerne*, much less religious freedom laws. In fact, the Supreme Court recently cited *City of Boerne* with approval in *Trump v. Anderson*, 601 U.S. 100 (2024), a case involving ballot access.

Second, the Administrator argues that *City of Boerne* cannot apply to the NVRA because Congress's authority to enact the NVRA derives from the Elections Clause. (Doc. 14 at 16.) To be sure, the NVRA is Election Clause legislation. *See Inter Tribal*, 570 U.S. at 7-9, 13-15. That was not Congress's only authority. As stated in *Condon v. Reno*, "Congress had a sound basis on which to conclude that a federal voter registration law was an appropriate means of furthering the protections of the Fourteenth and Fifteenth Amendments." 913 F. Supp. 946, 967; *see also id*.

at 962. This makes sense because the NVRA was designed, in part, to reduce "discriminatory and unfair registration laws and procedures" which Congress found "can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." 52 U.S.C. § 20501(a)(3).

Third, the Administrator argues that the "congruence and proportionality" test cannot be applied in these circumstances because the Disclosure Exemption "is not a substantive change to the constitution, which was *City of Boerne*'s concern." (Doc. 15 at 17.) To be sure, *City of Boerne* invalidated the Religious Freedom Restoration Act ("RFRA") because it was not "remedial, preventive legislation," but instead "attempt[ed] a substantive change in constitutional protections[.]" *City of Boerne*, 521 U.S. at 532. However, *City of Boerne*'s congruence and proportional test was the Supreme Court's method for deciding "whether RFRA is a proper exercise of Congress' § 5 power 'to enforce' by 'appropriate legislation' the constitutional guarantee[s]" of the Fourteenth Amendment. *Id*. at 517; *see also Tennessee v. Lane*, 541 U.S. 509, 556 (2004) (Scalia J., dissenting) ("[W]e formulated the 'congruence and proportionality' test for determining what legislation is 'appropriate.'").

City of Boerne, was, of course, not the first time the Supreme Court considered whether an act of Congress was "appropriate" under Section 5 of the Fourteenth Amendment. For example, in *Katzenbach v. Morgan*, 384 U.S. 641, 643 (1966), the Supreme Court reviewed a portion of Section 4(e) of the Voting Rights Act of 1965. The Court, in framing the inquiry, stated:

> We therefore proceed to the consideration whether § 4 (e) is "appropriate legislation" to enforce the Equal Protection Clause, that is, under the *McCulloch v. Maryland* standard, whether § 4 (e) may be regarded as an enactment to enforce the Equal Protection Clause, whether it is "plainly adapted to that end" and whether it is not prohibited by but is consistent with "the letter and spirit of the constitution."

Morgan, 384 U.S. at 643. Importantly, the majority also countered the suggestion by the dissenting justices that the Court's opinion was authorizing Congress to enact "statutes so as in effect to dilute equal protection and due process decisions of this Court." *Morgan*, 384 U.S. at 651 n.10. The Supreme Court was clear: "Congress' power under § 5 is limited to adopting measures to enforce the guarantees of the Amendment; § 5 grants Congress no power to restrict, abrogate, or dilute these guarantees." *Id*. (emphasis added).

The Public Disclosure Provision was designed, in part, to shed light on activities that might deny the right to vote or discriminate on the basis of race. Yet those protections are not afforded to the citizens of Wisconsin or the other exempt states. Congress has "no power" to "dilute" the Fourteenth Amendment's equal protection guarantees in this way. *Morgan*, 384 U.S. at 651 n.10. A law premised on equal protection, but which does not protect equally, cannot be considered "consistent with the letter and spirit of the constitution." *Morgan*, 384 U.S. at 643 (citations and quotations omitted).

It is no more "appropriate" for Congress to "enforce" the Fourteenth Amendment in a way that treats states and their citizens unequally, that it is for Congress to exceed its authority by enacting substantive legislation, as in *City of Boerne*. The congruence and proportionality test is an appropriate and useful check on the former situation, as much as the latter, because it helps ensure Congress is acting within its limited authority. The Disclosure Exemption lacks congruence and proportionality—and is therefore not "appropriate legislation" under Section 5—because it exempts states like Wisconsin, where the injuries Congress sought to remedy are equally prevalent and Congress's transparency and oversight objectives are equally relevant. (Doc. 1 ¶ 82.)

III. The Foundation States a Plausible Claim for an NVRA Violation.

The Administrator does not move to dismiss on the grounds that the Official Registration List is not within the NVRA's scope, or on the grounds that the NVRA does not preempt the challenged portions of Wisconsin law. Nor does the Administrator dispute the Foundation's alleged information-related injuries. Any such arguments should be considered waived at this stage. In any event, such arguments would fail, if made.

Courts universally agree that the NVRA requires disclosures of state voter rolls. (Doc. 1 ¶ 94; *see, e.g.*, *Bellows*, 92 F.4th at 49 (quoting 52 U.S.C. § 20507(i)(1) ("Maine's Voter File is a 'record[] concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters' and is thus subject to disclosure under Section 8(i)(1).").) Wisconsin's Official Registration List—including year-of-birth information—is no different. (*Id*. at ¶ 94; *Judicial Watch, Inc. v. Lamone*, 455 F. Supp. 3d 209 (D. Md. 2020) (holding that requestor is entitled to date-of-birth information under NVRA).) Furthermore, the NVRA preempts state laws—like the Birth Year Ban and the Data Fees— that stand as obstacles to Congress's objectives under the NVRA because the NVRA, as a federal enactment, is superior to conflicting state laws under the Constitution's Elections Clause. *See Inter Tribal*, 570 U.S. at 12-15. Therefore, by denying the Foundation's request for year-of-birth information, and conditioning access to the Official Registration List on payment of unreasonable fees, the Administrator is violating the NVRA.

The Foundation has standing because the Foundation plausibly alleges an informational injury (Doc. 1 ¶ 127) that is causing additional adverse consequences. *FEC v.* Akins, 524 U.S. 11, 21 (1998) ("[A] plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed pursuant to a statute."). For example, the

Foundation cannot evaluate and scrutinize Wisconsin's voter list maintenance activities (*id*. ¶ 129), or educate the public, election officials, and Congress about the same (*id*. ¶ 135-36). *See Public Citizen v. United States Department of Justice*, 491 U.S. 440, 449 (1989) ("As when an agency denies requests for information under the Freedom of Information Act, refusal to permit appellants to scrutinize the ABA Committee's activities to the extent FACA allows constitutes a sufficiently distinct injury to provide standing to sue."); *see also Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 364 (5th Cir. 1999) ("[A]n examination of the legislative history of the NVRA makes clear that Congress intended that organizations be able to sue under the Act.").

The NVRA's text and the uniform weight of authority support the Foundation's allegation that the Official Registration List is a record "concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." 52 U.S.C 20507(i)(1). The Foundation alleges that Wisconsin's Official Registration List is likewise subject to disclosure under the Public Disclosure Provision, because, *inter alia*, it reflects and is the end product of Wisconsin's voter list maintenance activities. (Doc. 1 ¶ 95 (citing *Bellows*, 92 F.4th at 47 ("The Voter File can thus be characterized as the output and end result of such activities. In this way, the Voter File plainly relates to the carrying out of Maine's voter list registration and maintenance activities and is thereby subject to disclosure under Section 8(i)(1).").)

The United States of America concurs. In the case of *Public Interest Legal Foundation v. Bellows*, No. 23-1361 (1st Cir.), the United States filed an *amicus curiae* brief urging the appellate court to affirm the lower court's holding that Maine's voter roll is within the NVRA's scope. Doc. 00118033423, *Public Interest Legal Foundation v. Bellows*, No. 23-1361 (1st Cir.,

filed July 25, 2023). It is United States' position that the NVRA's "[s]tatutory text, context, and purpose establish that Section 8(i) covers records concerning both voter registration and list-maintenance activities, including voter registration lists such as the Voter File." *Id*. at 14. A plain meaning analysis supports this interpretation. *See Project Vote*, 752 F. Supp. 2d at 706; *summary judgment granted by Project Vote/Voting for Am., Inc. v. Long*, 813 F. Supp. 2d 738 (E.D. Va. 2011), *affirmed by Project Vote*, 682 F.3d 331 (4th Cir. 2012).

Other than cite the Disclosure Exemption that is challenged herein, the Administrator offers no defense of the Birth Year Ban or the Data Fees. Dismissal under Rule 12 is inappropriate.

CONCLUSION

Wisconsin's Disclosure Exemption is no longer justified. The Court should so rule and deny the Administrator's motion to dismiss.

Dated: June 27, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2024, I electronically filed the foregoing using the Court's ECF system, which will serve notice on all parties.

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